Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

ALAN J. DIXON, Treasurer of the State of Illinois; MICHAEL J. HOWLETT, Auditor of Public Accounts of Illinois; and JAMES A. RONAN, Chairman of the Democratic State Central Committee of Illinois, as Individuals and in Their Capacity as Members *Ex Officio*, Who With Others Constitute the State Electoral Board of Illinois,
Petitioners,

vs.

THE HONORABLE LATHAM CASTLE, Senior Circuit Judge, THE HONORABLE WILLIAM J. CAMPBELL, Senior District Judge, and THE HONORABLE BERNARD M. DECKER, District Judge and THE HONORABLE THE UNITED STATES DISTRICT COURT for the Northern District of Illinois, Eastern Division; SHERMAN H. SKOLNICK; RICHARD B. OGILVIE, Governor of Illinois; JOHN W. LEWIS, Secretary of State of Illinois; WILLIAM J. SCOTT, Attorney General of Illinois; and VICTOR J. SMITH, Chairman of the Republican State Central Committee of Illinois, Both Individually and as Members *Ex Officio*, Who Also Constitute the State Electoral Board of Illinois; W. ROBERT BLAIR; Speaker of the Illinois House of Representatives, HENRY J. HYDE, Majority Leader of the Illinois House of Representatives, and EDWARD MADIGAN, Chairman of the Committee on Reapportionment of the Illinois House of Representatives; et al.,
Respondents.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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February, 1972

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IN THE

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OCTOBER TERM, 1971

No. .....

ALAN J. DIXON, Treasurer of the State of Illinois; MICHAEL J. HOWLETT, Auditor of Public Accounts of Illinois; and JAMES A. RONAN, Chairman of the Democratic State Central Committee of Illinois, as Individuals and in Their Capacity as Members *Ex Officio*, Who With Others Constitute the State Electoral Board of Illinois,
Petitioners,

vs.

THE HONORABLE LATHAM CASTLE, Senior Circuit Judge, THE HONORABLE WILLIAM J. CAMPBELL, Senior District Judge, and THE HONORABLE BERNARD M. DECKER, District Judge and THE HONORABLE THE UNITED STATES DISTRICT COURT for the Northern District of Illinois, Eastern Division; SHERMAN H. SKOLNICK; RICHARD B. OGILVIE, Governor of Illinois; JOHN W. LEWIS, Secretary of State of Illinois; WILLIAM J. SCOTT, Attorney General of Illinois; and VICTOR J. SMITH, Chairman of the Republican State Central Committee of Illinois, Both individually and as Members *Ex Officio*, Who Also Constitute the State Electoral Board of Illinois; W. ROBERT BLAIR, Speaker of the Illinois House of Representatives; HENRY J. HYDE, Majority Leader of the Illinois House of Representatives, and EDWARD MADIGAN, Chairman of the Committee on Reapportionment of the Illinois House of Representatives; et al.,
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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

The Petitioners are Alan J. Dixon, State Treasurer of Illinois, Michael J. Howlett, Auditor of Public Accounts of Illinois, and James A. Ronan, Chairman of the Democratic State Central Committee of Illinois. They appear

both individually and as members *ex officio* of the Illinois Electoral Board. They respectfully request this Court to issue a writ of certiorari to review the November 8, 1971 judgment of the United States Court of Appeals for the Seventh Circuit which denied their application for writs of mandamus and prohibition directed to the United States District Court for the Northern District of Illinois, Eastern Division.

OPINIONS BELOW

The principal case is **Skolnick v. Illinois Electoral Board** (N.D., Ill., E.D., No. 69-C-755). It is a supplemental proceeding to vacate, alter or amend the continuing provisional decree entered on December 8, 1965 in **Kirby v. Illinois Electoral Board**, 251 F.Supp. 908 (N.D., Ill., E.D., 1965) and approved in **People ex rel. Scott v. Kerner**, 33 Ill.2d 460, 211 N.E.2d 736 (1965).

On December 31, 1969, the District Court declared the population factors among the congressional districts devised by the 1965 provisional decree violative of **Kirkpatrick v. Preisler**, 394 U.S. 526 (1969). That opinion is reported at 307 F.Supp. 698. On September 21, 1971, the District Court entered a new decree. Its opinion and the dissenting opinion of District Judge Campbell are not yet reported and appear as Appendix A, hereto. Subsequent to the November 8, 1971 judgment of the Seventh Circuit Court of Appeals, the District Court entered its November 15, 1971 judgment granting a permanent injunction mandatorily enjoining the petitioners and their successors in office to enforce its September 21, 1971 order. This opinion and the dissenting opinion of Judge Campbell are not yet reported and appear as Appendix B, hereto.

The November 8, 1971 *per curiam* opinion of the Court of Appeals, in full text, is as follows:

Order

Petitioners have filed an Application for Writs of Mandamus and Prohibition and also an Emergency Application for Injunction Pending Review by Extraordinary Writ. They ask this court to vacate and expunge a judgment entered by a three-judge district court on September 21, 1971, or alternatively to vacate and expunge an order which that court had entered on October 22, 1971, striking two notices of appeal which petitioners had filed in the district court for the purpose of appealing from the September 21, 1971, judgment either to the Supreme Court or to this Court.

Appellate jurisdiction to review the merits of a judgment entered by a three-judge district court lies in the Supreme Court, not here. 28 U.S.C., § 1253. Our jurisdiction to issue an extraordinary writ is "in aid of" our own jurisdiction, not of the jurisdiction of the Supreme Court. See **United States Alkali Association v. United States**, 325 U.S. 196, 202. Accordingly, if there is any merit to petitioners contentions, they should be advanced in the Supreme Court, not here.

Petitioners suggest that Judge Campbell was not required to convene a three-judge court and, therefore, we should treat the proceedings in the district court as if they had been conducted by a single judge. We find no merit to this suggestion.

The application for an extraordinary writ, and the Emergency Application for Injunction Pending Review are denied.

JURISDICTION

The October 22, 1971 *ex parte* order of the District Court was entered after expiration of time under 28 U.S.C. § 2107. Thus, petitioners' application for issuance of the extraordinary writs was in aid of the Seventh Circuit's jurisdiction. 28 U.S.C. §§ 1291, 1651(a).

This Court's certiorari jurisdiction is invoked under 28 U.S.C. §§ 1254(1), 2101(e). This petition for certiorari is filed within 90 days of November 8, 1971 which will be February 6, 1972.

STATUTORY PROVISIONS INVOLVED

Title 28—United States Code

§ 1253. Direct appeals from decisions of three-judge courts.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction in any civil action suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

§ 1291. Final decision of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decision of the district courts . . . , except where a direct review may be had in the Supreme Court.

§ 2281. Injunction against enforcement of State statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any

State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges . . .

§ 1651. Writ.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Illinois Revised Statutes

Chapter 46, Section 7-14:

The Governor, who shall preside as Chairman, the Secretary of State, who shall act as secretary, the Attorney General, the State Treasurer, the Auditor of Public Accounts, and the respective Chairman of the State central committees of the 2 leading political parties shall constitute the State Electoral Board. * * *.

QUESTIONS PRESENTED

I

When it is contended that the District Court was without jurisdiction and that its judgment order neither grants nor denies an injunction upon the ground of the unconstitutionality of a State statute; did the Court of Appeals have jurisdiction to review the merits of a judgment entered by a three-judge district court?

II

Where a three-judge district court was patently erroneous when convoked; does the dissenting conclusion of law of the single district judge constitute the decision of the District Court?

STATEMENT OF THE CASE

The September 21, 1971 decree of the District Court changed the Illinois congressional districts prescribed in its continuing decree entered on December 8, 1965[1] which governed the 1966, 1968 and 1970 Illinois congressional elections. The population variances among the 1965 districts were subject to scrutiny by virtue of this Court's April 7, 1969 decisions in **Kirkpatrick v. Preisler,** 394 U.S. 526 and **Wells v. Rockefeller,** 394 U.S. 542. Without any federal constitutional compulsion for doing so, the District Court did not adjust its 1965 decree but reversed it and entered an entirely new one. It impeached conditions relevant to State policy upon which the 1965 decree was bottomed when the federal one man, one vote standard would have been better served by other redistricting proposals that were explicitly rejected.

The adversary parties in the 1965 **Kirby** case [See: footnote 1] were the Illinois officers who individually and *ex officio* constituted "the two opposing political factions of the State Electoral Board". 251 F.Supp. at 909. Petitioner Howlett and Respondent Scott were parties and adversaries in the 1965 litigation. The remaining petitioners and respondent State officers are the successors and transferees in interest of the other **Kirby** litigants. Accordingly, during the pendency of the 1965 decree they were automatically substituted for their predecessors in

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[1] **Kirby v. Illinois Electoral Board,** 251 F.Supp. 908 (N.D., Ill., E.D., 1965).

office and bound to enforce the terms and conditions of that prior judgment.[2] Thus, in terms of the prior **Kirby** case, petitioners Howlett, Dixon and Ronan are presently aligned with the defendant **Kerner** political faction and respondents Scott, Ogilvie, Lewis and Smith are presently aligned with the **Kirby-Scott** faction of the Electoral Board.

The 1965 judgment was entered with the prior approval of the Supreme Court of Illinois[3] and by the consent of the parties. At 251 F.Supp. p. 909, District Judge Campbell stated as follows:

> On September 10, 1965 the Supreme Court of Illinois in **People ex rel. Scott v. Kerner**, 32 Ill.2d 539, 208 N.E.2d 561, by appropriate order afforded the two opposing political factions of the State Electoral Board opportunity to settle in an orderly fashion the Illinois Congressional reapportionment controversy. Thereupon, with the approval of the Illinois Supreme Court . . . . I requested counsel for the opposing factions to confer with me in pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure. * * * Both counsel also agreed to endeavor with my assistance, to stipulate to a fair and equitable reapportionment of Illinois Congressional districts in accordance with the Federal Constitutional principle of "one man, one vote".

On November 19, 1965, the Supreme Court of Illinois filed its opinion approving the proposed decree, declaring[4] *inter alia*, as follows:

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[2] See: Rule 25(c) and 25(d)(1), Federal Rules of Civil Procedure; **Wright v. School Board of Greenville County**, 309 F. Supp. 671 (E.D., Va., 1970).

[3] **Scott v. Kerner**, 33 Ill.2d 460, 211 N.E.2d 736 (1965) and see prior opinion—32 Ill.2d 539, 208 N.E.2d 561 (1965).

[4] Scott v. Kerner, supra, 33 Ill.2d at 462, 211 N.E.2d 736 (1965).

> We believe the provisional plan so adopted to be just, equitable and constitutionally valid. As stated in the Federal district court's pre-trial memorandum, this plan utilizes "the nucleus of each existing Congressional district * * * enlarging or decreasing it to comply with the 'one man, one vote' principle" thereby according the greatest possible effect to the 1961 legislatively devised apportionment which heretofore governed Congressional representative elections.

Relying on the refined constitutional standards of **Kirkpatrick**, *supra*, this case was filed on April 9, 1969 and challenged the interdistrict population variances under the 1965 **Kirby** decree. Plaintiff Skolnick, acting *Pro Se*, instituted this proceeding and claimed to invoke jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). District Judge Campbell was assigned and on April 10, 1969 he entered an order "that the matter must be determined by a Three Judge Court pursuant to . . . 28 U.S.C. §§ 2281, and 2284" [Appendix D, *infra*, p. A-54]. Plaintiff did not request a district court so constituted.

Thus, the respondent judges—Circuit Judge Castle, and District Judges Campbell and Decker—who constituted the **Kirby** three-judge district court were reconvened.

After declaring that the 1965 population variances could not stand scrutiny under **Kirkpatrick** standards [307 F. Supp. 698] there were hearings in aid of the District Court's obligation to adjust its 1965 decree. Five proposals were presented and all were found to constitutionally comply with **Kirkpatrick** [A-5]. Thus, the adjudicatory standard applied was "to consider what non-population factors went into the drawing of each" [A-5].

Although each proposal complied with **Kirkpatrick**, only one followed the non-federal "core" principle.[5] This

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[5] For simplicity, clarity and consistency with the District Court's references to it; the "nucleus of each existing congressional district, etc." is called the "core" principle.

was the Congressional Delegation plan [called Delegation plan] referred to in Judge Campbell's dissent [A-27] as follows:

> I conclude that the plan submitted by the equally bipartisan Illinois Congressional Delegation should be adopted by this court as a fair, just, equitable and mathematically accurate up-dating of our provisional plan to conform to the 1970 census and the one man one vote constitutional principle.

The majority opinion [A-8] declares as follows:

> The argument advanced in support of the core principle is that the court in applying the principle is required to involve itself as little as possible in the "political" task of reapportionment: it merely takes the existing map as it finds it and alters a few boundary lines to accommodate population changes.

The majority then declared that "the court should avoid spoiling a brand-new apple by using an old core" [A-9]; and concluded by rejecting any such jurisdictional inhibitions. The September 21, 1971 order adopts "without judicial modification" [A-12], Illinois House Bill 2907 [Blair plan] which had failed in the Illinois Senate.

The Delegation plan is mathematically superior to Blair's and would have maintained the 12 Republican—12 Democratic political balance—a fact in harmony with the November 3, 1970 statewide Congressional vote split of 51.9% Democratic [1,814,064] and 48.1% Republican [1,680,861]. The new decree alters the Illinois political balance by creating 14 "safe" Republican districts. Predicated on the November 3, 1970 election figures, *supra*, and in terms of voter representation, the impact of the judgment below increases the political voting power of 48.1% of the voters to 60% of the elected Representatives in the Illinois Congressional delegation. Thus, approximately 356,000 Illinois voters [12% x 3,500,000] are disenfran-

chised in terms of political voting power. This appears to go to the question reserved in **Fortson v. Dorsey**, 379 U.S. at 439 and **Wells v. Rockefeller**, 394 U.S. 544—has the District Court exercised its remedial power to achieve a "constitutionally impermissible" gerrymander?

Had District Judge Campbell envisioned this proceeding in the context of the September 21, 1971 decree, he would have refused to convene a three-judge court. Then, the Court of Appeals would have been the appropriate appellate forum.[6] Thus, his jurisdictional views [A-13, et seq.], are relevant:

1) Because the allegations of plaintiff's complaint brought into question the validity of our continuing provisional decree . . . the cause was assigned to my calendar and to this panel as being related to the original **Kirby** case [A-16].

2) [T]he jurisdiction of this panel under our general retention order was and is limited to making our provisional plan constitutional under changing Supreme Court decisions and population census changes . . . [A-17].

3) The **Blair** plan [decree below] is a purely partisan effort by the Republican leadership in the Illinois House. I further find its only distinction to be the extent to which it achieves the utmost in political gerrymandering. It is not mathematically the best plan . . . It completely abandons the 'nucleus of existing congressional districts' . . . [A-21].

4) [B]y adopting the Blair plan the majority completely disregard the sole function of our self extended and outworn jurisdiction in this case and

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[6] **Idlewild Bon Voyage Liquor Corp. v. Epstein**, 370 U.S. 713; **Buchanan v. Rhodes**, 385 U.S. 3; **Shackman v. Arnebergh**, 387 U.S. 427.

become legislators in their own right. [A-25 and A-26].

5) In their drastic departure from the provisional plan the majority not only breaks faith with the Supreme Court of Illinois but in my view seriously misleads the parties to this litigation. This cause came to this panel as a related case—related to 1965 **Kirby** case, in which the provisional plan was promulgated by this panel and the Illinois Supreme Court. If such drastic relief had been thought possible, surely the parties would have insisted upon a new assignment which would have been their right under our local rule. [A-26].

The majority opinion emphasizes the divergence of jurisdictional viewpoint [A-10] as follows:

> We are not persuaded by this rationale of the dissent of our distinguished colleague Senior District Judge Campbell. We perceive nothing in our previous rulings which affords a basis for his premise that our jurisdiction in this matter is limited to arriving at a reapportionment plan based on outmoded cores. Nor, in our order inviting interested parties to submit reapportionment proposals, did we require the proposals to begin with the 1965 core. The order of July 13, 1971 was unqualified, and Judge Campbell's assertion that the parties were invited 'to validate our provisional plan' can only represent his personal interpretation of the meaning of our order.

Because of judicial absences, the District Court was unable to reconvene after its September 21 order until November 5, 1971.

On October 21, 1971 petitioners filed Notices of Appeals under 28 U.S.C., §§ 1253 and 1291. On October 22, 1971, respondent, District Judge Decker, acting *sua sponte* and

without notice or hearing entered an *ex parte* order as follows:

> [T]he documents described as 'Notice of Appeal to the United States Court of Appeals, Seventh Circuit' and 'Notice of Appeal to the Supreme Court of the United States' filed by Jack Cassidy, attorney for certain individual members of the State Electoral Board of Illinois, not parties herein, on October 21, 1971, are hereby stricken. The Clerk is directed to return to said attorney any filing fee paid at the time of said filing.

With exception of the judicial respondents, all others had applied to the District Court, under 28 U.S.C., §§ 1651 (a) and 2283 and Rule 65 of the Federal Rules of Civil Procedure, to enjoin an original mandamus proceeding in the Supreme Court of Illinois which questioned the September 21 Congressional Districts. [**People ex rel. Germano v. Lewis, et al.**, Ill.Sup.Ct. No. 44728]. That action did not question the federal constitutional requirement of precise mathematical equality of population among districts but questioned whether the District Court should have brushed aside matters of purely local concern when it was not constitutionally compelled to do so. In that matter the Illinois Supreme Court, on motion of these petitioners, had entered the following order:

> The motion by respondents Dixon, Howlett and Ronan for leave to be represented by separate counsel coming on to be heard without objection;
>
> It is ordered that leave is given said respondents to be represented by John E. Cassidy, Jr., Attorney-at-Law; that the separate responses and suggestions of said respondents be filed on or before November 5, 1971, and that said counsel may participate in the oral argument of this cause on November 9, 1971.

The application for injunction was also sought against Alan J. Dixon, Treasurer, Michael J. Howlett, Auditor, and James A. Ronan, as members of the State Electoral Board of Illinois.

After respondent Judge Decker entered his October 22 order, *supra*, he set hearing on the injunction applications for November 5, 1971, but withheld notice thereof from petitioners.

Petitioners then filed their application for writs of mandamus and prohibition in the Seventh Circuit Court of Appeals.

Among others, petitioners' application for writs was grounded on the following alternatives:

> 1) The October 22 order adjudicating that the officers constituting the "individual members of the State Electoral Board of Illinois (are) not parties herein" was a judgment that the District Court had been without subject matter and *in personam* jurisdiction *ab initio*.
>
> 2) But petitioners were automatically substituted as successors in interest of the individual parties in the 1965 **Kirby** case and continuing consent decree entered therein. [See: Rule 25, F.R.C.P.] Thus, the District Court lost jurisdiction on October 21, 1971 when petitioners perfected their appeals.

And with regard to the September 21, 1971 order changing Illinois' 24 Congressional districts, the application was also predicated on the following:

> 1) Unless the District Court's jurisdiction is derived from the 1965 **Kirby** case and the rule that "a continuing decree of injunction directed to events to come is subject always to adaption as events may shape the need" [**United States v. Swift & Co.**, 286

U.S. 106, 114]; the District Court was without jurisdiction under 43 U.S.C., § 1983 and 28 U.S.C., §§ 1343, 2281, 2284.

2) The continuing constitutionality of the Congressional districts devised by the 1965 **Kirby** decree constituted the subject matter of Skolnick's claim and thus, Judge Campbell's April 10, 1969 order [A-74] "that the matter must be determined by a Three Judge Court pursuant to the provisions of Title 28 U.S.C., §§ 2281 and 2284" was void when entered. Since a federal provisional decree is not a state statute a three-judge district court was not required under 28 U.S.C., § 2281 and the additional judges who constituted the majority had no jurisdiction to act.

3) The complaint did in fact constitute a bill by a non-party for relief from the 1965 continuing decree and all parties to a consent decree are necessary and indispensable parties to a modification proceeding—in their absence the District Court was without jurisdiction to act.

4) Even if the **Kirby** court was properly reconvened under "the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent" [**United States v. Swift & Co.**, 286 U.S. at 114] the modified decree was not a judgment authorizing a direct appeal under 28 U.S.C., § 1253.

Without regard to whether the case was a "proceeding required by an Act of Congress to be heard and determined by a district court of three judges" [28 U.S.C., § 1253] the Court of Appeals held that "appellate jurisdiction to review the merits of a judgment entered by a three-judge district court lies in the Supreme Court, not here. 28 U.S.C., § 1253." [**Dixon v. Castle**, 7 Cir., 71-1788

—Order, at p. 3, *ante*]. The Court of Appeals also denied its jurisdiction under 28 U.S.C., §§ 1291, 1651(a) on the following ground:

> Petitioners suggest that Judge Campbell was not required to convene a three-judge court and, therefore, we should treat the proceedings in the district court as if they had been conducted by a single judge. We find no merit to this suggestion.[7]

The District Court temporarily enjoined the November 9, 1971 hearing in the Supreme Court of Illinois and on November 15, 1971 entered a permanent injunction which, in pertinent part, provides as follows: [A-64 and A-65].

> It Is Hereby Ordered, therefore, that all parties and the amicus curiae in the matter entitled **People ex rel. Joseph Germano v. John W. Lewis**, No. 44728, in the Supreme Court of Illinois, specifically . . . Alan J. Dixon, Treasurer, Michael J. Howlett, Auditor, James A. Ronan, Chairman Democratic State Central Committee . . . members of the State Electoral Board of Illinois, their officers, agents, employees and attorneys and all other persons having knowledge of this court's order herein, be, and are hereby, permanently restrained and enjoined from further proceeding in the above-entitled action now before the Illinois Supreme Court or from filing any new actions affecting the matters herein in issue or in any way interfering with the electoral process applicable to Congressional elections or the terms of our order of September 21, 1971.

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[7] This is somewhat misleading in that the contention was not made with regard to appellate jurisdiction under § 1291. The contention was made with respect to the September 21 order and the jurisdiction of the judges constituting the majority. It goes to our question II, p. 6, *ante*: "Where a three-judge district court was patently erroneous when convoked; does the dissenting conclusion of law of the single district judge constitute the decision of the district court?

> . . . and . . . are restrained and enjoined from taking any action designed to or which will have the effect of interfering with the carrying out of said order of September 21, 1971.

The injunction goes on and permanently restrains the operation of Section 4 of Article I of the Constitution of the United States by mandatorily enjoining petitioners and other individual officers constituting the Electoral Board as follows:

> . . . to accept filing and conduct elections, only in accordance with the provisions of the September 21, 1971 order of this court adopting a congressional redistricting plan, and in conformity with the election statutes of the State of Illinois which are not inconsistent therewith.

REASONS FOR GRANTING THE WRIT

The decree in this case is subject to reversal because the District Court abused its power or was without jurisdiction. There is no jurisdiction under 42 U.S.C., § 1983, 28 U.S.C., §§ 1343 and 2281 over a claim that a prior provisional consent decree is unconstitutional because of a refinement of constitutional standards after it was entered. Thus, jurisdiction of the District Court had to be predicated on the proposition that a court has power to modify an injunction in adaptation to changed conditions though it was entered by consent. **United States v. Swift & Co.**, 286 U.S. 106.

The 1965 case was instituted to restrain the enforcement of the Illinois Congressional apportionment statute [Ill. Rev.Stat., 1963, Chap. 46, § 156.f.1] as violative of the principles of **Wesberry v. Sanders**, 378 U.S. 1. Although the Illinois Supreme Court held the statute unconstitutional [**People ex rel. Scott v. Kerner**, 32 Ill.2d 539, 208 N.E.2d

561 (1965)], the District Court had been properly constituted under 28 U.S.C., §§ 2281 and 2284. And, with the prior approval of the Illinois Supreme Court, that three-judge district court did enter the decree under attack in this case. It is clear from the 1965 State [33 Ill. 2d 460] and federal opinions [251 F.Supp. 908] that the prior decree has three essential attributes or conditions.

> 1) Prior approval by the Supreme Court of Illinois after being consented to by "the two opposing political factions of the State Electoral Board" which constituted settlement "in an orderly fashion the Illinois Congressional reapportionment controversy" [**Kirby v. State Electoral Board**, at p. 7, *ante*].
>
> 2) Compliance with the then applicable "one man, one vote principle" [*Ibid*, at p. 8, *ante*].
>
> 3) Adherence to the "core" principle; that is, the "plan utilizes the nucleus of each existing congressional district . . . thereby according the greatest possible effect to the 1961 legislatively devised apportionment which heretofore governed Congressional representative elections" [See: 33 Ill.2d at 462, quoted at p. 8, *ante*].

As this Court stated in **Chrysler Corp. v. United States**, 316 U.S. 556, 562, the test for reviewing modifications of consent decrees is "whether the change served to effectuate or thwart the basic purpose of the decree." And in **United States v. Swift & Co.**, 286 U.S. at 119, the Court stated the principle as follows:

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the

conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting.

"Thus, the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons the scope of a consent decree must be discerned within its four corners and not by reference to what might satisfy the purposes of one of the parties to it." **United States v. Armour & Co.**, 402 U.S. 673.

In terms of power, the same principles were declared by Justice Holmes in **Prentis v. Atlantic Coast Line Co.**, 211 U.S. 210, 226. A "judicial inquiry" he said: "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist," while legislative power "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

Thus, in **Whitcomb v. Chavis**, 413 U.S. 124, the Court held that "even if the District Court was correct in finding unconstitutional discrimination . . . it did not explain why it was constitutionally compelled . . . to intrude upon state policy any more than necessary to ensure" constitutionally prescribed representation. In this regard, the Court concluded [See: 29 L.Ed.2d at 386]:

> The remedial powers of an equity court must be adequate to the task but they are not unlimited. Here the District Court erred in so broadly brushing aside state apportionment policy without solid constitutional or equitable grounds for doing so.

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> The remedial powers of an equity court must be adequate to the task but they are not unlimited. Here the District Court erred in so broadly brushing aside state apportionment policy without solid constitutional or equitable grounds for doing so.

Tested by these standards the September 21, 1971 redistricting order cannot stand scrutiny. The fact that the District Court majority felt that "outmoded cores" [See: p. 11 *ante*] broadened its jurisdiction beyond that necessary to adjust the 1965 decree to conform with **Kirkpatrick** and **Wells** standards is neither decisive nor particularly relevant. The critical facts remain the same:

1) After explicitly recognizing that "the core principle" requires the Court "to involve itself as little as possible in the 'political' task of reapportionment," the District Court majority "perceive(d) nothing in our previous ruling which affords a basis . . . that our jurisdiction . . . is limited to arriving at a reapportionment based on outmoded cores."

2) The Delegation plan, which had a more mathematically precise equality of population among districts and followed the "core" principle, was rejected by the District Court majority in favor of an Illinois House Bill which failed in the Illinois Senate and thus, changed essential conditions of the 1965 decree by having no standards "supposed already to exist." [**Prentis v. Atlantic Coast Line Co.**, supra].

3) Thus, it becomes apparent that the District Court majority knowingly swept aside these equitable

and jurisdictional restraints upon its remedial power to achieve what dissenting Judge Campbell defines as "a purely partisan effort by the Republican leadership of the Illinois House" whose "only distinction (is) the extent to which it achieves the utmost in political gerrymandering" and it "is not mathematically the best plan" and "completely abandons the nucleus of existing Congressional districts" [p. 10, *ante*].

Notwithstanding the District Court majority's disclaimer "that our jurisdiction in this matter is limited to arriving at a reapportionment plan based on outmoded cores" [p. 11, *ante*], the crucial fact is that the "outmoded cores" constituted a judicial standard which produced a mathematically more precise equality of population among the adjusted Congressional districts of the Delegation plan than did the "brand new" districts legislatively devised by the **Blair** plan and adopted by the District Court "without judicial modification".

In this sense, and at this juncture, the District Court's September 21 decree violated two of the "three essential attributes or conditions" attendant upon modification of the 1965 decree [See, p. 17, *ante*]. It violated number 2, in the sense that the Court had before it the Delegation plan whose population variances achieved a higher degree of "precise mathematical equality" and the decree thus resorted to the *de minimus* approach condemned in **Kirkpatrick v. Preisler**, 394 U.S. at 530-531. And the majority District Court opinion explicitly and boldly rejected the "core principle" listed *ante* as number 3.

The remaining "attribute or condition" of the 1965 decree relates to its "prior approval by the Supreme Court of Illinois after being consented to by 'the' two opposing political factions of the State Electoral Board" [p. 17, *ante*]. And this is relevant, not only to the indispensibility

of the individual members of the Electoral Board as parties in this proceeding, but to whether the District Court had the power or jurisdiction to enter a decree which constituted, as to the '65 decree, tacit "impeachment in its application to conditions that existed at its making" and reversed it "Under the guise of readjusting." **United States v. Swift & Co.**, 286 U.S. at 119 (quoted at pp. 17-18, *ante*). Thus, the Court need not pause to consider whether the District Court "should avoid spoiling a brand new apple by using an old core." [See: p. 9, *ante*]. For even if "this argument would have great force if addressed to a court which had the responsibility for formulating original relief", that is not here at stake. "Here, . . . where we deal with the construction of an existing consent decree such an argument is out of place. Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms" and "naturally the argument reached normally embodies a compromise; . . . . the parties each give up something[8] they might have won." **United States v. Armour & Co.**, 402 U. S. 673, 29 L. Ed. 2d at 263. It would be pure euphemism to contend that "one man, one vote" lies at the heart of any reapportionment controversy. The controversy rages around partisan political advantage and that is precisely what was involved between "the two opposing political factions of the State Electoral Board". [251 F. Supp. at 909] in the 1965 **Kirby** case. And since the decree below altered the political balance from 12 Republican and 12 Democratic Illinois congressmen to at least 14 Republican and 10 Democratic, that is precisely why these Petitioners, who had been represented by separate counsel from June 3, 1969, perfected their appeals [28 U.S.C. §§ 1253 and 1291] on October 21, 1971.

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[8] Judge Campbell's opinion in **Kirby v. State Electoral Board**, 251 F. Supp. 909, describes in detail the problems and procedures involved in reaching the 1965 consent decree.

On October 22, 1971, without prior motion or hearing of any sort, District Judge Decker entered the order striking petitioners' notices of appeals filed by Jack Cassidy, attorney for certain individual members of the State Electoral Board of Illinois, not parties herein, on October 21, 1971 [Full order appears at p. 12, *ante*]. The Attorney General, and his "opposing political faction of the State Electoral Board" violated his 1965 agreement and the principle that "the decree itself cannot be said to have a purpose, rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and the skill to achieve"[9] and thus "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties. **United States v. Armour & Co.**, supra (quoted at p. 18, *ante*).

His application for permanent injunction was thereafter granted and permanently foreclosed the Supreme Court of Illinois with regard to its prior approval of the 1965 decree and specifically and individually enjoined there petitioner, even though the District Court had held several days earlier that they were "not parties herein."

Thus it was that the petitioners applied to the Seventh Circuit Court of Appeals for review by extraordinary writ and it is in this context that the questions now presented must be considered.

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[9] Judge Campbell's dissenting opinion of September 21, 1971, points this out, viz.:

> "In their drastic departure from the provisional plan the majority . . . seriously misleads the parties. . . . If such drastic relief had been thought possible surely the parties would have insisted upon a new assignment which would have been their right . . ." [p. 11, ante].

I

Did the Court of Appeals Have Appellate Jurisdiction to Review the Merits of the September 21, 1971 Judgment Entered by a District Court of Three Judges and Thus Jurisdiction Under 28 U.S.C. 1651(a).

In its November 8, 1971 order [p. 3, *ante*] the Seventh Circuit declared: "Appellate jurisdiction to review the merits of a judgment entered by a three-judge court lies in the Supreme Court, not here. 28 U.S.C., § 1253." Patently, this is an erroneous proposition of law. Under § 1253, jurisdiction is not dependent upon a three-judge district court—*ipso facto;* but whether the proceeding below was one **required** by any act of Congress to be heard and determined by a three-judge district court **AND** whether the judgment appealed was one granting or denying an injunction. [See e.g.: **Perez v. Ledeema,** 401 U.S. 82; **Gunn v. University Committee to End the War,** 399 U.S. 383; **Mitchell v. Donovan,** 398 U.S. 427; **Goldstein v. Cox,** 396 U.S. 471; **Public Service Commission v. Brashear Freight Lines, Inc.,** 312 U.S. 621; **Stainback v. Mo Hock Ke Lak Po,** 336 U.S. 368].

Thus, the real question that emerges is not whether jurisdiction to review a judgment entered by a three-judge court lies, *ipso facto,* in the Supreme Court, but whether the Supreme Court must, in every instance where the judgment was entered by a three-judge district court, first determine that it is without jurisdiction under 28 U.S.C. § 1253. Considered in this light the importance of the question is plainly clear, as the Court observed in the **Gunn** case *supra*:

> What we deal with here is no mere technicality. In **Goldstein v. Cox,** supra, we pointed out that "Their Court has more than once stated that its jurisdiction under the Three-Judge Court Act is to be narrowly

> construed since any loose construction of the requirements of [the Act] would defeat the purpose of Congress,"[10] to keep within narrow confines our appellate docket (Citations).

Oftentimes, it seems, the court has as much, if not more, difficulty reviewing the jurisdictional question as with the merits of the case. [See e.g., **Perez v. Ledesma**, *supra*]. And where the jurisdictional issue is involved, so is the right of at least one appellate review and it seems that even where disposition is by summary action a great deal more care is required than in those cases where the petitioner or appellant has already been afforded appellate consideration—and our observation has been that the Court has been scrupulously careful in this regard as is shown by **Perez v. Ledesma**, supra, and cases cited in footnote 6, p. 10 *ante* to name but a few. In **Perez v. Ledesma**, for example, the Court ordered that "the judgment is vacated and the case remanded . . . with instructions to enter a fresh decree from which the parties may take an appeal to the Court of Appeals for the Fifth Circuit if they so desire." In terms of **Perez**, the question now presented, is whether the Fifth Circuit Appellate Court, where jurisdiction was vested under 28 U.S.C. § 1291, had jurisdiction to determine its own jurisdiction —*a fortiori* this Court's lack thereof—in the first instance.

If not, why not? It seems a palpable incongruity for this Court to hold that it is without jurisdiction under § 1253 and at the same time to hold that jurisdiction under § 1291 is subject to that condition precedent. We submit that if that be the case then the district court should not be required to vacate "to enter a fresh decree" because the time for appeal should not commence to run until appellate jurisdiction attaches.

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[10] Omitted in the Court's opinion.

From our introductory discussion of the merits, it should be apparent that the error upon which petitioners rely is the difference in the rationale underlying the majority and dissenting opinions of the District Court. Thus, had the petitioners' October 21, 1971 appeals not been stricken and had they prevailed on their appeal the end result would have been a judgment in accordance with Judge Campbell's dissenting conclusion of law; i.e., adoption of "the plan submitted by the equally bipartisan Illinois Congressional Delegation" [p. 9, *ante*].

When viewed in this context, the jurisdictional questions presented by this Petition are likewise dispositive of the principal case and controversy. And since our research has failed to turn up any prior cases where the district judge to whom the case was assigned and who initiated the designation of a three-judge court was also the dissenting judge we urge that this case is uniquely postured for this Court to resolve important, but as yet unresolved, questions under the Three-Judge Court Act.

It was a long time before it was clear whether the courts of appeals had jurisdiction to review a refusal to convene a three-judge district court. **Stratton v. St. Louis S. W. Ry.**, 282 U.S. 10; **Ex parte Metropolitan Water Co.**, 220 U.S. 539. It is now clear that jurisdiction does lie in the courts of appeal in this regard [**Mengel Rich v. Industrial Commission**, 393 U.S. 83; **Wilson v. City of Port Lavoen**, 391 U.S. 352, and others cited in footnote 6, p. 10, *ante*], and in consequence both the administration of the Act and this Court's appellate docket should have been expedited.

The subject matter of this proceeding is the 1965 consent decree entered in **Kirby v. State Electoral Board**, 251 F. Supp. 908 and the claim it was rendered unconstitutional when **Kirkpatrick v. Preisler**, supra and **Wells v. Rockefeller**, supra, were decided. The single district judge

(Campbell) ordered that 28 U.S.C., § 2281 required him to reconvene the 1965 **Kirby** three-judge court but the additional judges thereby designated "perceived nothing in our previous rulings . . . that our jurisdiction in this matter is limited" to adjusting the 1965 Kirby decree and thus, Judge Campbell's April 10, 1969 order with regard to § 2281 was patently wrong when entered. But even if he were right that § 2281 required the three-judge court who entered the original decree to modify it the necessity of the three-judge court is still subject to scrutiny as of the time the prior decree was entered. The **Kirby** opinion [251 F. Supp. 908] makes it clear that the December 8, 1965 decree was not required to be entered under 28 U.S.C., §§ 2281, 2284. The Illinois Supreme Court had held the relevant Illinois statute unconstitutional almost six months before the **Kirby** decree was entered.

It needs no citation of authority in support of the assertion that there are four essential requirements for the application of § 2281: (1) a state statute must be challenged; (2) a state officer must be a party defendant; (3) injunctive relief must be sought; and (4) it must be claimed that the state statute is unconstitutional.

Even a cursory analysis of the **Skolnick** claim and the opinions filed on September 21, 1971 against the above four standards under § 2281 constitute the inescapable conclusion that the Seventh Circuit Court of Appeals fell into jurisdictional error when it held that appellate jurisdiction to review the merits of the September 21 judgment "lies in the Supreme Court, not here. 28 U.S.C., § 1253."

Judge Campbell's comments [pp. 10-11, *ante*] make it perfectly clear that had he perceived that the judges constituting the majority would "perceive nothing . . . that our jurisdiction in this matter is limited by the prior **Kirby** decree, he would not have reconvened the three-judge court." Had that been the case appellate jurisdic-

tion would have been under 28 U.S.C., § 1291 and there seems to be no good reason why it should be any different when, as here, the order convening it under § 2281 shows on its face that it was erroneous when entered. Indeed, those cases involving a single district judge's decision that no substantial Constitutional issue is presented has a great deal more subtlety than cases where the fatal flaw is the absence of a challenge to a State statute upon grounds that the statute is unconstitutional.

II

Does the Dissenting Conclusion of Law of the Single District Judge Who Erroneously Convoked the Three-Judge District Court Constitute the Final Decision of the District Court.

Had this case first been brought to this Court under 28 U.S.C., § 1253 the appeal would have been dismissed after vacating the September 21, 1971 judgment and remanding to the District Court with instructions that the single district judge enter a fresh decree from which a timely appeal may be taken to the Seventh Circuit Court of Appeals. In that event, such an order would have constituted a reversal on the merits because the single district judge is the dissenting district judge. The same result is achieved in this case by granting the writ of certiorari, vacating the November 8, 1971 order and remanding with direction to the Seventh Circuit Court of Appeals to award such writs as are necessary to effectuate District Judge Campbell's dissenting conclusion of law as the final judgment below. [Compare: **Public Service Comm'n v. Brashear Freight Lines, Inc.**, 312 U.S. 621; also, **Flemming v. Nestor**, 363 U.S. 603, 607; **Kennedy v. Mendoza-Martinez**, 372 U.S. 144. For an analogous but corollary situation see: **Petuskey v. Compton**, 431 F.2d 378 (10 Cir., 1970)].

CONCLUSION

Petitioners earnestly urge that the Court grant their petition for writ of certiorari to the Seventh Circuit Court of Appeals and give its plenary consideration to the important questions presented.

Respectfully submitted

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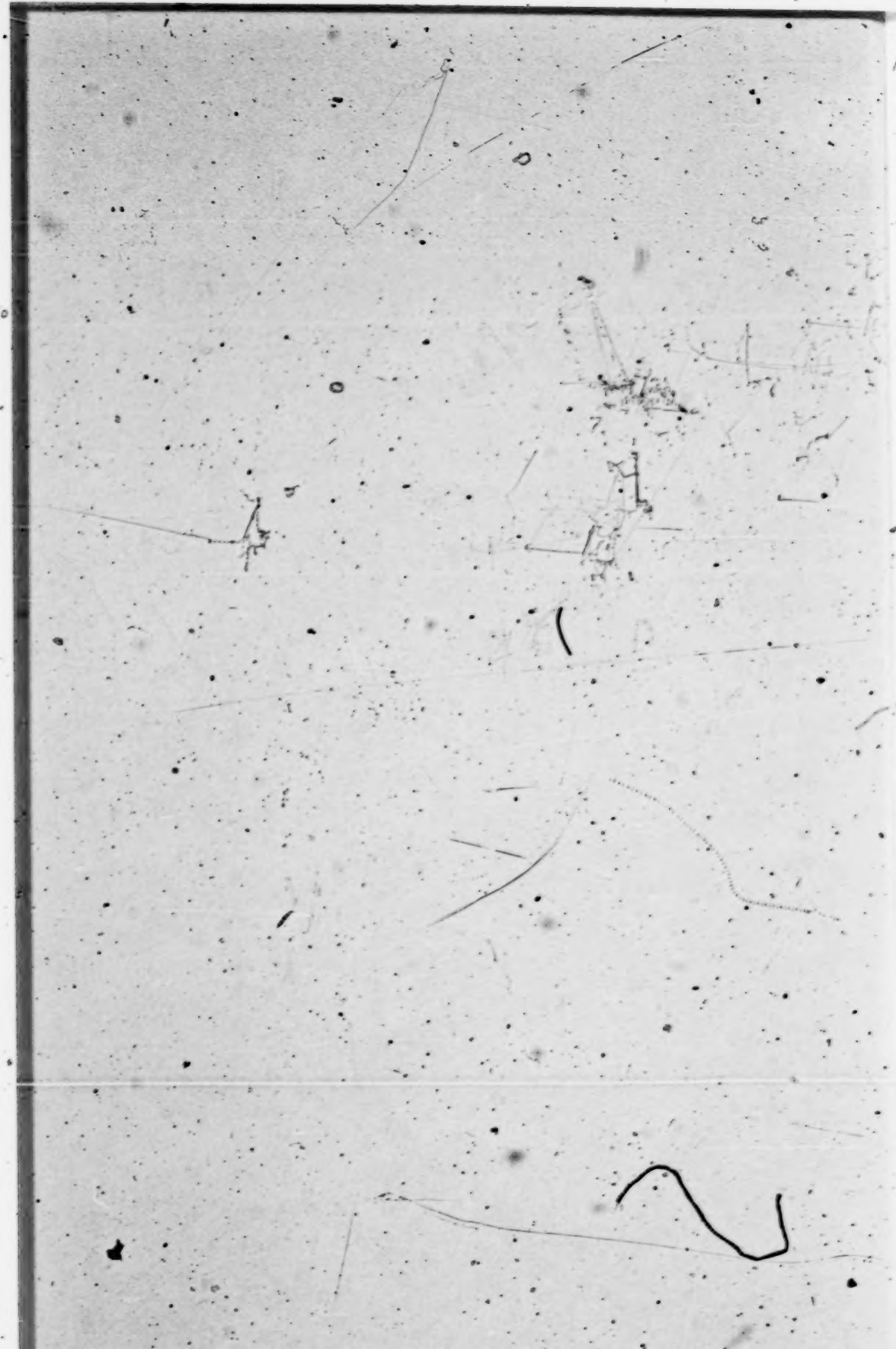
APPENDIX



APPENDIX A

OPINION

(Filed Sep. 21, 1971)

In the United States District Court for the Northern District of Illinois, Eastern Division

Sherman H. Skolnick, et al., Plaintiffs, vs. State Electoral Board of Illinois, Defendant, William L. Springer, et al., Intervenors.	No. 69 C 755.

Before Castle, Senior Circuit Judge, Campbell, Senior District Judge, and Decker, District Judge.

Decker, District Judge.

This is the latest chapter in the quest to apportion Illinois' twenty-four Congressional districts so that they comply with the constitutional mandate of one man one vote. **Wesberry v. Sanders**, 376 U.S. 1 (1964). In 1961 the Illinois General Assembly established districts on the basis of population figures derived from the 1960 decennial census. Ill.Rev.Stat. ch. 46, § 156f.1. The sizes of the districts varied substantially, the largest having a population almost twice as great as the smallest. The population disparity in the 1961 map was challenged in the state court, and in **People ex rel. Scott v Kerner**, 32 Ill.2d 539, 208 N.E.2d 561 (1965), it was held unconstitutional. Jurisdiction was retained in order to oversee the drawing of a pro-

visional map for the 1966 Congressional election which complied with the Constitution.

At the time the state court declared the 1961 map unconstitutional, there was pending in this court, before the same panel of three judges as is now convened, a suit to compel the reapportionment of Illinois' Congressional districts. With the aid of the parties to the litigation, this court adopted a provisional map which was to be used for the elections beginning in 1966. **Kirby v. Illinois State Electoral Board**, 251 F.Supp. 908 (N.D.Ill. 1965). The Illinois Supreme Court gave its approval to that plan. **People ex rel. Scott v. Kerner**, 33 Ill.2d 460, 211 N.E.2d 736 (1965). It was drawn up largely on the basis of the 1961 map, the court using the existing twenty-four districts as a nucleus, and then modifying district lines to comply as nearly as practicable with the constitutional requirement of numerical equality. The result was a plan in which the population of the largest district was 7.5 per cent above the average district, and the smallest district was 6.1 per cent below the average district.

Following the 1969 Supreme Court decisions in two Congressional reapportionment cases, **Kirkpatrick v. Preisler**, 394 U.S. 526 (1969), and **Wells v. Rockefeller**, 394 U.S. 542 (1969), plaintiffs Sherman H. Skolnick and Harriet Sherman filed the present lawsuit to test the constitutionality of the 1965 plan. The case was heard by the same three-judge panel which participated in the **Kirby** case. After considering the 1965 plan in relation to the requirement of mathematical exactness as set out in **Kirkpatrick** and **Wells**, the court held that it was unconstitutional. **Skolnick v. Illinois State Electoral Board**, 307 F.Supp. 698 (N.D.Ill. 1969) (per curiam). The court permitted the 1970 Congressional election to proceed under the 1965 plan. Looking forward to the 1972 election, it issued the following order:

> "This court assumes that the General Assembly of Illinois will, during its legislative session in the first half of 1971, enact a complete and constitutionally valid plan of reapportionment for election of Members to the United States House of Representatives from Illinois. Defendant is hereby ordered to present to this court on or before July 1, 1971 such duly enacted plan of reapportionment. Upon failure so to do this court shall undertake appropriate relief." 307 F. Supp. at 700.

However, a new map was never adopted by the Assembly. Representative Edward Madigan, the Chairman of the House Committee on Reapportionment, testified that a map drawn up for his committee was approved by the House of Representatives on June 28, 1971, by the margin of 148-1. The Senate adjourned on June 30, 1971, however, without taking any final action on the House-approved bill. Because the legislature failed to adopt its own map, it fell upon this court to effect a constitutionally-acceptable reapportionment scheme.

Plaintiffs Skolnick and Sherman, appearing *pro se*, submitted a proposed map to the court for its consideration. Defendant Illinois State Electoral Board had no map of its own, since the legislature had not adopted one. Therefore, upon the invitation of the court, interested parties were permitted to intervene and submit proposed maps. One party was the Illinois Congressional Delegation, representing the twenty-four incumbent members of Congress from the State of Illinois. Another map was presented by Mr. Aram A. Hartunian, appearing *pro se*. The final intervening group was comprised of Representatives W. Robert Blair, Henry J. Hyde and Edward R. Madigan of the Illinois General Assembly. Their map was, with one minor exception, the same as the one passed by the Illinois House and introduced into the Senate earlier this year.

The court considered only the maps submitted by plaintiffs and the above-mentioned intervenors. However, it permitted other interested parties to file observations and suggestions with regard to the four proposed plans. It received such suggestions from the Illinois Republican State Central Committee and the Republican Central Committee of Cook County, from the Illinois Democratic State Central Committee and the Democratic Central Committee of Cook County,[1] and from the Democratic Chairmen of the 22nd Congressional District. Finally, the court received the comments of Mr. James Chapman, representing the Chicago Bar Association, the Amicus Curiae. Mr. Chapman's comments did not receive the prior approval of the Chicago Bar Association, thus they are to be considered as his personal remarks only.

A hearing was conducted in this matter on September 2 and 3, 1971. On the first day, the four map proponents presented evidence and made arguments in support of their respective plans. On the second day, the defendant, the amicus, and the intervenors who did not submit maps were permitted to offer their arguments in support of and in opposition to the four maps. By the end of the hearing it had become clear that each of the four maps presented population districts which were substantially equal, and that the variations in district boundaries were explainable by the fact that each map-maker had taken certain non-population factors into account in drawing up his map.

In one of the most recent cases on the subject of Congressional reapportionment, **Kirkpatrick v. Preisler**, 394 U.S. 526 (1969), the court rejected the notion that there was a percentage population variance which could be

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1. State Senator Cecil Partee attempted to submit a map as an exhibit to his comments and suggestions. However, his map was successfully objected to as not properly submitted, hence it was not before the court for its consideration.

considered *de minimus*. In order to justify any population variance, no matter how small, the court required the proponent of a particular map to demonstrate either that the variances were unavoidable despite a good-faith effort to achieve absolute equality, or that there was some factor which justified the variances.

It became evident at the hearing that the primary factor influencing each map-maker in drawing up his respective map was equality of population. In no case did any of the proposed districts vary more than one percent above or below the mathematical average of 463,082 inhabitants.[2] Other factors were clearly secondary. By coming within one percentage point of the mathematical average, each of the four clearly made a good-faith effort to avoid any variance and therefore complied with **Kirkpatrick**. Obviously, no map can achieve absolute mathematical perfection. Changes have already occurred since the taking of the census by reason of births, deaths, and population mobility. However, within the context of the figures supplied by the Bureau of the Census, the variances in each plan are so small that the only way to distinguish among them is to consider what non-population factors went into the drawing of each.

Plaintiff Skolnick and his expert witness testified that the only considerations other than population which governed the drawing of his map were that the districts be compact and contiguous. However, there is no requirement of contiguity and compactness imposed by federal law. See **Wood v. Broom**, 287 U.S. 1 (1932); **Preisler v.**

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[2] Within the less than one per cent variance, we specifically find that the order of deviation ranks as follows, from smallest to largest:

1. Skolnick-Sherman.
2. Illinois Congressional Delegation.
3. Blair-Hyde.
4. Hartunian.

Secretary of State of Missouri, 257 F.Supp. 953, 955, n. 2 (W.D.Mo. 1966), **aff'd per curiam** 385 U.S. 450 (1967); **Meeks v. Avery**, 251 F.Supp. 245, 250 (D.Kans. 1966); **Park v. Faubus**, 238 F.Supp. 62, 65, n. 2 (E.D.Ark. 1965); **Clark v. Carter**, 218 F.Supp. 448, 449 (E.D.Ky. 1963).

The shortcoming of plaintiffs' map is that it ignores traditional boundaries of political subdivisions for the sole purpose of drawing compact, contiguous districts. Certainly compactness and contiguity are desirable features. Indeed, all four maps have districts which are compact and contiguous. However, they are not required by the Constitution, and to ignore effective representation for the sake of district symmetry is not proper. There are values to be preserved in drawing districts which in some way attempt to follow boundaries of cities, townships, counties, etc. It became apparent upon cross-examination of plaintiffs' expert that, at least in Cook County, some effort was made to observe traditional boundaries of political subdivisions. However, plaintiffs' too rigid adherence to the boundaries of census tracts, without regard to traditional political boundaries, requires that their proposed map be rejected.

The Hartunian map is concerned primarily with one non-population factor, the encouragement of closely-contested, or "swing" districts. Mr. Hartunian has devised a map based largely upon vote results in the 1968 and 1970 Congressional elections. The districts have been drawn so that seventeen are "safe" districts, i.e., districts which will almost certainly elect a Democrat (seven) or a Republican (ten). The remaining seven districts are represented as having been drawn so that neither of the two major parties would enjoy a predictable majority. In these seven districts it was hoped that the bloc of independent voters would, according to the political climate, sway the election for one party or the other.

Implicit in the Hartunian plan is an aversion for "safe" Congressional seats. The proponent of the map has argued that there is no place in a reapportionment scheme for the protection of incumbents from vigorous contests for re-election. However, the fact that a given plan may minimize the number of close contests in a Congressional election does not of itself invalidate that plan. See **Ely v. Klahr**, 403 U.S. 108, 112, n. 5 (1971); **Burns v. Richardson**, 384 U.S. 73, 89, n. 16 (1966); *contra*, **League of Nebraska Municipalities v. Marsh**, 242 F.Supp. 357, 360 (D.Neb. 1965), **appeal dismissed** 382 U.S. 1021 (1966).

No authority has been cited to the effect that partisan balance is required in each district when devising a map. Indeed, the Hartunian map invites the court to speculate on the outcome of future elections in Illinois' twenty-four Congressional districts based upon voting figures from the last two elections. While **Baker v. Carr**, 369 U.S. 186 (1962), and its progeny thrust the court into the "political thicket" of reapportionment, it did not to our knowledge invite the court to become a prognosticator of election results. Given the vagaries of electoral politics, and given the imperfect data available for predicting the outcome of elections, it would be unwise for the court to establish as a criterion for Congressional redistricting the establishment of politically-balanced districts. Therefore, the Hartunian map must be rejected.

The map of the Illinois Congressional Delegation was, as its name suggests, drawn up by the twenty-four members of Congress from Illinois. The Delegation's map was first introduced as a reapportionment bill in the Illinois House of Representatives, where it was voted down by the Committee on Reapportionment. The primary non-population factor taken into account in drawing the Delegation map was the so-called "core" principle, namely

the conscious adherence to previous district boundaries, with concessions made to pre-existing boundaries only when population changes so require. The argument advanced in support of the core principle is that the court in applying the principle is required to involve itself as little as possible in the "political" task of reapportionment: it merely takes the existing map as it finds it and alters a few boundary lines to accommodate population changes.

To the extent the core of the 1965 Congressional map was changed to create the proposed Delegation map, that change was effected by the incumbent congressmen who revamped the boundaries of the districts and then submitted the map to the Delegation's expert, Dr. Godwin, for his comparison with 1970 census data. Of course, there was no evidence introduced of the drafter's drawing up district boundaries to solidify their own partisan electoral support. And, as indicated in regard to the Hartunian map, there appears to be no constitutional infirmity in drawing an otherwise valid map which protects incumbents. Nevertheless, there are compelling reasons why the core principle should not be accorded the status of the primary and controlling non-population factor which must dictate our choice in this matter.

The core of the existing Congressional map, the one used in the last election, is almost certainly outmoded at this date. As Dr. Godwin testified, the 1965 provisional map was based upon the 1961 map originally drawn up by the legislature. The 1961 map was held unconstitutional in **People ex rel. Scott v. Kerner**, *supra*, because of the great population variance among the districts. In drawing up the 1965 map, which was only provisional, the court took the nucleus of the 1961 map, but changed it considerably, to bring the districts more into equality of size. In turn, however, new Supreme Court law ren-

dered even the 1965 plan unconstitutional, again because of the population variance among districts. **Skolnick v. Illinois State Electoral Board**, *supra*.

Under these circumstances, it is difficult to imagine any justification for using the existing core as a starting point for a new map. The core was originally drawn ten years ago, based upon the 1960 census. It was held unconstitutional, redrawn provisionally, and again held unconstitutional. It is sophistry to claim now that the core is a creation of the state legislature which should be changed slightly but preserved in its essence. It has been changed once, considerably, by this court, and it would be changed considerably again if the Delegation map were adopted, so that it can in no way properly be called the "legislature's" map.

Most important, the 1970 census figures are now available. They indicate significant population changes over the past decade. For instance, the City of Chicago declined in population by 5.2 per cent during the last ten years. More dramatically, during the same period suburban Cook County increased in population by 34.5 per cent. The changes suggest not only a shift of population from the city to its surrounding suburbs, but also an influx of people to the suburbs from outside Cook County. Under these circumstances, there is little justification for adhering to the core of a map drawn up using outmoded census figures.[3] The core principle may have been followed in a rough way in drawing up the 1965 provisional map, when the 1960 census figures were the only ones available. Now, however, the 1970 census figures are available, and there is no compelling reason to apply them to the 1961-1965 core.

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[3] Or, to paraphrase a comment made by counsel for defendant, the Court should avoid spoiling a brand new apple by using an old core.

We are not persuaded by the rationale of the dissent of our distinguished colleague Senior District Judge Campbell. We preceive nothing in our previous rulings which affords a basis for his premise that our jurisdiction in this matter is limited to arriving at a reapportionment plan based on outmoded cores. Nor, in our order inviting interested parties to submit reapportionment proposals, did we require the proposals to begin with the 1965 core. The order of July 13, 1971, was unqualified, and Judge Campbell's assertion that the parties were invited "to validate our provisional plan" can only represent his personal interpretation of the meaning of our order.

Judge Campbell, apparently relying on his long experience, has attempted to predict the political consequences of the acceptance of the Blair proposal. We suggest that any shift of the boundary lines of existing districts in order to equalize population is bound to have some political consequences. This is true whether the lines are shifted wittingly by incumbent congressmen for the purpose of protecting their seats or unwittingly for the sole purpose of achieving a compact district. We prefer not to indulge in any judicial speculation as to the future voting patterns in any particular district, new or old. Political prognostication is a dangerous and futile exercise.

Despite the eloquent plea made by our brother Campbell, we find the Illinois Congressional Delegation map to be unacceptable.

The Blair map was drawn up by a political scientist and an urban planning firm retained by the Illinois House Committee on Reapportionment. The main non-population factor taken into account in drawing up the Blair map was the recognition of the existence of metropolitan communities and existing county lines. **Maryland Citizens Committee for Fair Congressional Redistricting, Inc. v. Tawes**, 253 F.Supp. 731, 735 (D.Md.), **aff'd sub nom., Alton v.**

Tawes, 384 U.S. 315 (1966) (per curiam). For instance, seven out of the eight Chicago districts are wholly contained within the city limits, and three out of the four suburban Cook County Districts are located outside the city but within the county. Only one district, the Third, overlaps between the city and the suburbs. Downstate, the boundaries of the remaining twelve districts follow, wherever possible, county lines. It is clear that the Blair map is a good-faith effort to adhere to existing communities of interest and existing political boundaries.

Representative Madigan testified that his map did not take into account the residence of incumbent congressmen. He also testified that the drafters of the Blair map were not instructed to take into account the compactness and contiguity of the districts. However, even a cursory examination of the Blair map shows that the twenty-four districts are substantially compact and contiguous. The unaesthetic appearance of certain boundaries does not detract from the fact that equality of population has been substantially achieved. **Kirkpatrick v. Preisler**, 394 U.S. 526, at 536 (1969).

Moreover, the map did get the overwhelming approval of one house of the legislature. It would be unwise to attempt to guess the fate of the map in the upper house, had it been brought to a vote. However, the approval of the bill in the state House of Representatives is at least probative of the fact that the Blair map had substantial bipartisan support among certain legislators.[4]

The largest district on the Blair map has only 6930 more inhabitants than the smallest district. The two dis-

[4] The record is silent as to the reasons for the near unanimous support for the Blair map in the House, and it would be sheer speculation to argue, as has been done by our brother Campbell, that the only purpose for its passage was so that it could be used as a vehicle for negotiations in the Senate.

tricts at the extremes deviate only three-quarters of a per cent from the numerical average. Thus, it is clear that the primary consideration, equality of districts, was sufficiently achieved. Moreover, it was achieved without substantially impairing recognized political boundaries and communities of interest.

It has been suggested, particularly by the Democratic Chairmen of the 22nd Congressional District, that the court take it upon itself to alter the boundaries of one or more districts in order to include or exclude certain political subdivisions. This the court refuses to do. Perhaps the Blair map could be improved upon, making the districts more congruous as to some political subdivision boundaries. However, in this instance, it would not be a proper judicial task to undertake. The districts in the Blair map are already so near to being equal in population that it would serve no useful purpose to further refine them. Moreover, the drafters of the Blair map followed, as nearly as possible, existing political boundaries, and it would be unwise for the court merely to substitute its choice of different political boundaries. Therefore, the Blair map will be accepted without judicial modification.

For all the foregoing reasons, the Blair-Hyde-Madigan plan of reapportionment, as set out in Appendix 2 and Appendix 3, is found to meet all federal constitutional requirements and is hereby approved and declared to be the Congressional map for the State of Illinois, beginning with the 1972 election to the United States House of Representatives and continuing thereafter until Illinois Congressional districts are reapportioned in accordance with law.

Judgment Order

The foregoing memorandum opinion is hereby adopted as our findings of fact and conclusions of law.

It is therefore ordered that the reapportionment plan as set out in Appendix 2 and Appendix 3[3] attached to our memorandum opinion be, and the same is, declared to meet all federal constitutional requirements, and it is further ordered that said plan of reapportionment govern the nomination and election of members of the House of Representatives of the United States Congress beginning with the 1972 primary and election and continuing thereafter until Illinois Congressional districts are reapportioned in accordance with law.

It is further ordered that the defendant, State Electoral Board of Illinois, in the performance of its duties and functions under the Illinois election laws, be governed by and comply with said plan of reapportionment accordingly.

Dated this 20th day of September, 1971.

Enter

LATHAM CASTLE
Senior Circuit Judge

BERNARD M. DECKER
District Judge

Findings of Fact, Conclusions of Law and Memorandum

Campbell, Senior Judge, dissenting:

The first of this series of related cases concerning the apportionment of the Congressional districts of Illinois, **Kirby v. Illinois State Electoral Board**, 65-C-75, was filed in this court in January of 1965. That case challenged the Congressional districts which were enacted by the Illinois legislature pursuant to statute and purportedly on the basis of population (Illinois Rev. Stat., Ch. 46, § 156

[3] Appendix 1, also attached, is a summary of the population data for the twenty-four Congressional districts.

f.1) in its 1961 session. The districts so drawn were not substantially equal in population and as such were constitutionally invalid. **Westberry v. Sanders**, 376 U.S. 1 (1964). The **Kirby case** and a later filed case, **Kusek v. Kerner**, 65-C-81, were consolidated before me as the judge to whom the lower numbered case had been assigned by lot. (See local Rule 10 of this district.) Shortly after the case was assigned to me, I determined that this was a matter which must be heard by a three judge court pursuant to 28 U. S C. § 2284. Subsequently and pursuant to § 2284 Chief Circuit Judge Castle and District Judge Decker were designated to complete the three judge panel.

Similar litigation was pending at that time in the Supreme Court of Illinois, see **People Ex Rel. Scott v. Kerner**, 32 Ill. 2d 539 (1965). By order of the Supreme Court of Illinois and of this court the two political factions which make up the State Electoral Board were granted an opportunity to settle this controversy in an orderly fashion in pre-trial conference in this court. Accordingly and pursuant to that order and with the approval of the Illinois Supreme Court and Judges Castle and Decker, I conducted lengthy Rule 16 (F.R.C.P.) conferences with counsel for both parties and subsequently reached an agreement on districts which fully complied with the then Supreme Court standards in terms of "one man-one vote." See **Kirby v. Illinois State Electoral Board**, 251 F. Supp. 908. Again with the approval of the Illinois Supreme Court simultaneous decrees were entered and promulgated as the redistricting plan for the Illinois Congressional districts. See **Kirby** and **People Ex Rel. Scott**, *supra*.

In fashioning the relief in that case we stressed in our opinion, as did the Illinois Supreme Court in its opinion, that all of the districts originally established by the legislature, including those admittedly malapportioned, constituted a nucleus around which constitutional congressional

districts can be and were constructed without drastic change. As stated in my opinion: "I have furthermore with the approval of the Illinois Supreme Court, after studying the maps of the parties and considering the areas of divergence, prepared a congressional reapportionment plan utilizing the nucleus of each existing congressional district and enlarging or decreasing it to comply with the one man, one vote principle." 251 F.Supp. at 910.

In its simultaneous decree, the Illinois Supreme Court also stressed the same considerations:

> We believe the provisional plan so adopted to be just, equitable and constitutionally valid. As stated in the Federal District Court's pretrial memorandum, this plan utilizes the nucleus of each existing congressional district, * * * enlarging or decreasing it to comply with the 'one man, one vote' principle, thereby according the greatest possible effect to the 1961 legislatively devised apportionment plan which should heretofore govern congressional representative elections" (33 Ill. 2d at 462).

The Illinois Supreme Court added that it considered our resolution of this problem an accomplishment it deemed "conducive to the best interests of the people of this State."

Both courts also stressed that, "Since apportionment problems are pre-eminently legislative responsibilities, the plan described in this opinion is required only by legislative nonfeasance and is therefore provisional in nature."

The provisional judicial plan was thus put into effect and governed the congressional elections of 1966 and 1968, due to continued legislative nonfeasance.

In 1969, in the wake of two decisions of the United States Supreme Court, **Kirkpatrick v. Preisler**, 394 U.S. 526 (1969), and **Wells v. Rockefeller**, 394 U.S. 542 (1969),

plaintiffs filed this latest case alleging that the provisional judicially drawn districts of 1965 exceeded constitutional standards promulgated in those new cases. In **Kirkpatrick** deviations of only 3.13 percent above and 2.83 percent below the average were held invalid. In **Wells** the court rejected deviations ranging from 6.6 percent above to 6.8 percent below the average. The provisional judicially drawn map of Illinois contained deviations as high as 7.5 percent above the average and 6.1 percent below. Because the allegations of plaintiffs complaint brought into question the validity of our continuing provisional decree entered mutually with the Supreme Court of Illinois, the cause was assigned to my calendar and to this panel as being related to the original **Kirby** case.

Upon a hearing we concluded that the relief we fashioned in our provisional plan in the light of recent and subsequent Supreme Court cases did not go far enough in the adjustments that we had made in the original legislative districts. We therefore concluded that the provisional plan was itself not constitutional, and that further modifications were necessary. 307 F. Supp. 698. We further concluded that because the 1960 census figures were no longer reliable, the most appropriate relief would be to permit the election of 1970 to proceed under the provisional plan still in effect and await the computation of reliable and accurate census figures which would be available after the 1970 census. In our order we specifically stated we assumed that the General Assembly of Illinois would at long last do its duty and enact a valid plan for the districting of Illinois Congressional districts based on the 1970 census. If it failed so to do we specifically stated that, "this court shall undertake appropriate relief" obviously thus anticipating possible further adjustments in the 1961 legislative plan.

When viewed against this background it is clear to me that the jurisdiction of this panel under our general re-

tention order was and is limited to making our provisional plan constitutional under changing Supreme Court decisions and population census changes until the Illinois legislature exercises its primary constitutional function of drawing new districts for the election of members to the United States House of Representatives. We have, in my judgment, no authority at this stage of these seven year old "provisional" proceedings to usurp the legislative function and draw entirely new districts to favor one geographical segment of the state, to reduce minority representation, to gerrymander politically to the benefit of one party or for any other reason.

When the legislature failed in its duty to redistrict during the 1971 session we invited all parties, and all those who sought to become parties, to file with the court any proposal they might have to validate our provisional plan until the legislature should finally act. In response to that order four plans were timely filed; one by the plaintiff; one by the Illinois Congressional Delegation; one by the Republican Leadership of the Illinois House of Representatives;[1] and a fourth by one Aram Hartunian, a private citizen and attorney who sought leave to intervene. The Illinois Democratic State Central Committee and Democratic Central Committee of Cook County ("Democratic Party") also filed a plan in support of their argument at the hearing.

A hearing was held, evidence submitted and arguments heard as to the merits or lack thereof in each of the plans submitted. Upon said evidence as submitted and pursuant to Rule 52, F.R.C.P., I make the following Findings of Fact and Conclusions of Law.

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[1] This plan was submitted by W. Robert Blair, Speaker of the House, Henry J. Hyde, Majority Leader of the House and Edward R. Madigan, Chairman of the House Reapportionment Committee.

The teachings of **Kirkpatrick v. Preisler** and **Wells v. Rockefeller**, *supra*, require mathematical exactness in the drawing of congressional districts, and any variance, however so slight, must be justified. In light of those teachings it is apparent that in any apportionment case where there are alternatives before a court the court must approve the plan which appears to be the most perfect in terms of population or find specific facts as to why the most perfect plan was rejected in favor of another proposal. This proposition is illustrated in a recent decision of Chief Justice Warren Burger denying a stay order in a school segregation case, **Board of Education v. Scott**, No. 71-274, Oct. Term 1971, decided August 31, 1971. In that case, the Chief Justice cites and quotes a prior decision in the case rendered by the Court of Appeals for the Fourth Circuit: "If the district court approves a plan achieving less actual desegregation than would be achieved under an alternate proposed plan, it should find facts that are thought to make impracticable the achieving of the greater degree of integration."

In this case it is stipulated by all parties and I now so find that the most perfect plan before this court in terms of mathematical exactness is that submitted by the Democratic Party in its argument before us. Accordingly under the teachings of **Kirkpatrick** and **Well**, *supra*, we are bound to accept that plan or find facts which indicate that the acceptance of that plan is impracticable or that the acceptance of another is for some reason justified.

In my consideration of the plan submitted by the Democratic Party I find that partisan inspired plan unacceptable as it goes well beyond the limited provisional relief anticipated in our prior decrees and orders, and presents an entirely new plan both in theory and in practical result.

I find the plans submitted by plaintiff Skolnick, Mr. Hartunian, and by the Republican leadership (generally

referred to as the "Blair" plan) unacceptable for the same reasons. I further find and conclude that the only map presented to the court which complies or even attempts to comply with our limited power to alter the provisional decree is that expertly drawn plan submitted by the Illinois Congressional delegation. That plan is supported by all incumbent Congressmen from Illinois (12 Republicans and 12 Democrats). In terms of mathematical equality between districts, it is clearly superior to the maps of the plaintiff, of Hartunian and of the Republican leaders of the House which follow in that order. Most importantly, however, the Congressional delegation has in a statesmanlike fashion submitted a plan which totally utilizes the nucleus of each existing congressional district and enlarges or decreases a district only in so far as it is necessary to do so to comply with our directive of mathematical exactness. In this regard it causes the least drastic changes in the provisional plan heretofore promulgated by this court and the Illinois Supreme Court and accomplishes exactly what in my judgment this panel has the limited jurisdiction to do.

In adopting the Congressional Delegations' proposal as the only valid plan before the court, I conclude that a court, no less than a legislature, should, where possible, avoid doing "unnecessary violence to the heart of existing districts". **Maryland Citizens Committee for Fair Congressional Redistricting v. Tawes**, 253 F. Supp. 731 (M.D. Md. 1966). For continuity in government is a valid consideration in legislative redistricting. See **Skolnick v. City Council**, 319 F. Supp. 1219 (N.D. Ill. 1970).

I am gratified that James P. Chapman, Esq., who is Executive Director of the Independent Precinct Organization, an active force in independent politics and who was appointed by the Chicago Bar Association to act on its behalf as *Amicus Curiae* and as counsel for the class, i.e.,

the voters of Illinois, appears to agree with my analysis of the various proposals. Mr. Chapman,[2] speaking only as our appointed Amicus Curiae summarized for us at our hearing the various proposals.

As to the proposal of the Congressional Delegation Mr. Chapman in substance stated that this proposal has merit in that it grows on something the Courts have approved in the past and something originally approved in the process of political give and take, i.e., the 1961 statute.

The adoption of the Congressional Delegations' plan will also preserve the harmony and good relations this Court has enjoyed with the Courts of Illinois. The history of judicial reapportionment in Illinois thus far records close cooperation between this court and the Illinois Supreme Court thus avoiding any disruption of state-federal relations in this ultra sensitive subject. The mutual involvement of the Illinois Supreme Court and this Court in the subject of reapportionment is discussed in detail by Professor Robert G. Dixon, "Democratic Representation-Reapportionment in Law and Politics" (Oxford University Press 1968). Stated briefly, in 1965 cases involving the apportionment of the Illinois State Senate were filed in both the Illinois Supreme Court and this Court. See **People Ex Rel. Engle v. Kerner**, 203 N.E. 2d 33 (1965), and **Germano v. Kerner**, 241 F. Supp. 715 (ND Ill. 1965). Because of the potential controversy between this Court and the Supreme Court of Illinois, the Supreme Court of the United States wisely directed our Court to defer to the Illinois Supreme Court in our reapportionment efforts. After extensive Rule 16 (F.R.C.P.) conferences were held by me, agreement was reached on the Illinois Senate Re-

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[2] Mr. Chapman stated that he could not speak for the Chicago Bar Association because of the impossibility due to limitations of time to seek approval of his position by the Association's Board of Managers.

apportionment and the map in that case was jointly promulgated by this Court and the Illinois Supreme Court. These Congressional redistricting cases immediately followed and as above stated agreement was again accomplished on the same basis. See **Kirby v. State of Illinois Electoral Board**, and **People Ex Rel. Scott v. Kerner**, *supra*. I think it quite apparent from reading our decision in **Kirby** and the decision of the Supreme Court in **People Ex Rel. Scott**, that this harmony was preserved only by our adoption of a plan which was provisional in nature and which utilized the nucleus of existing districts based on the last valid legislative plan. I conclude that any drastic deviation from the provisional plan approved by the Illinois Supreme Court breaks faith with that Court and is totally inconsistent with the directive of the United States Supreme Court to defer to the Illinois Court in these reapportionment issues.

My distinguished brothers constituting the majority of this panel approve entirely without any changes even to accomplish the mathematical perfection of the other plans before us and as a new provisional plan the proposal submitted by the Republican leadership of the Illinois House of Representatives referred to as the Blair Plan. I regret that I must at this point part company with them in this case.

The Blair Plan I find is a purely partisan effort by the Republican leadership in the Illinois House. I further find its only distinction to be the extent to which it achieves the utmost in political gerrymandering. It is not mathematically the best plan. It has no relationship whatsoever to the plan adopted by this court jointly with the Supreme Court of Illinois as a provisional plan in 1965. It completely abandons the "nucleus of existing congressional districts" and thereby gives no effect, to the 1961 legislatively devised apportionment plan."

The Blair Plan is all but identical to the proposal introduced into but not passed by the Illinois Legislature (H.B. 2907, 77th General Assembly). The bill did pass the House of Representatives in the last hours of the last session, but only as a vehicle for negotiations in the Senate. Those negotiations of course failed and the bill did not pass the Senate. Furthermore, the bill as passed also contained a complete plan for the reapportionment of Illinois Senate and House districts. Its passing the House is thus totally irrelevant. Indeed, the weakness of the majority opinion herein is demonstrated by its reliance on this thin reed.

We were told by their counsel that the Blair Plan is a desirable one because it "recognizes existing political boundaries," that is as many districts as possible are completely contained within the City of Chicago. Ironically in the rest of Cook County the plan completely disregards the territorial integrity of cities and villages. Instead, antiquated township lines are followed, which guarantees that municipalities will be divided. On cross-examination, Representative Madigan, the chief architect of the Blair proposal, admitted that the City of Chicago was the only city whose boundaries were considered in the preparation of his proposal.

By Mr. Hartunian:

Q. You found it appropriate in drawing the map that you submitted to differentiate the City of Chicago's population from all the suburban population of Cook County. That is what your map does, isn't it?

A. Yes, sir.

Q. Is that because you find that it's advisable to keep cities as much as possible separate, separate from suburban areas, on the basis of community of interest?

A. It is an expression of a desire on my part to recognize the existing political boundaries wherever that can be done without causing opulation variances, and I believe that we have done that.

Q. In the 12th District and in the 10th District, for example, you used township lines, didn't you?

A. That's right.

Q. You are aware that township lines run **right through various municipalities?**

A. **Yes, sir.**

Q. Do you know whether or not the northern boundary of Maine Township runs right through the Village of Glenview?

A. No, I do not know that.

Q. Well, do you know whether or not the township boundaries of Maine Township run through several muncipalities?

A. No, sir, I do not know that.

Q. Do you know that it's typical, at least in Cook County, for township lines to run right through municipalities?

A. Are you asking me if I know——

Q. If you know that.

A. (Continuing): ——that that type of situation exists generally throughout Cook County?

Q. Yes.

A. **Yes**, I'm aware of that.

Q. So in using township lines, **you necessarily divide municipalities?**

A. That's correct.

On the basis of the evidence I find that the sole reason the geographic boundaries of Chicago are adhered to in the Blair proposal while all others are disregarded is that by containing as many districts as possible totally within the City of Chicago—where votes are predominantly Democratic—the number of seats that party can win in Congress is limited and the voices of the many minorities residing in Chicago are diluted.

Blair proponents also urge that the "suburbs" are entitled to more representation because population trends

indicate a movement of population from the city into the suburbs. But any map approved on the basis of one-man one-vote will insure equal representation to every voter no matter where he lives.

Finally, the Blair proposal is said to be without any political motivation whatsoever. I find that suggestion to be completely dispelled in the following colloquy which occurred after Representative Madigan explained that in their proposal there was only one district (the 17th) where he was sure there was no present incumbent congressman.

Q. Now, does the Speaker of the Illinois House presently reside in District 17?

A. In proposed District 17, yes.

Judge Campbell: That is Mr. Blair?

Mr. Reuben: Mr. Blair.

By Mr. Reuben

Q. Old District 17 is Mr. Arends' district, is it not?

A. That's right.

Q. Present District 17. And he would be—under your proposal, he would be no longer—no longer reside in new District 17, correct?

Mr. Wexler: I object to that, because Representative Arends can change his address at any time.

Mr. Reuben: Assuming he doesn't.

Judge Castle: Overruled. He may answer.

By the Witness

A. Assuming that Representative Arends continues to live in Melvin, he would live in proposed District 15.

By Mr. Reuben

Q. Did the Speaker of the House name you as chairman of the reapportionment committee?

Mr. Wexler: Objection.

Judge Castle: Overruled.

By the Witness

A. Yes.

Furthermore, I find that while counsel urging the Blair proposal vigorously attacks the Congressional delegation map as an attempt to protect incumbents, in the Blair proposal no incumbent Republican is threatened with loss of his seat in Congress. It seems that in the opinion of the Blair proponents protection of incumbents can be either vice or virtue depending upon the political affiliation of the incumbent.

In sum, the Blair proposal—which passed the Illinois House of Representatives only as a vehicle for negotiations which failed in the Senate—is but a poorly disguised attempt to segregate the voters of the City of Chicago from the rest of Cook County in an effort thereby to dilute the overall voting strength of the large Democratic majorities that reside within that City. It has the ancillary benefits of preserving the seats of all incumbent Republicans and assuring for the Speaker of the House a seat in Congress for him or his designate. In my judgment it has no other merits which lend itself to adoption by this court.

Again paraphrasing our *Amicus*, Mr. Chapman, the Blair proposal in its effort to separate the City of Chicago from the remainder of Cook County has an obvious devisive effect and is founded on political considerations not in the public interest.

I mean no criticism of the Republican leaders of the Illinois House for their preparation and presentation of their plan, both in the General Assembly and before this Court. On the contrary, I commend them for their partisan advocacy. I do take issue with my brothers on this Court however to the extent that they may adopt such partisan advocacy in their decree.

In my view, by adopting the Blair plan the majority completely disregard the sole function of our self extended and outworn jurisdiction in this case and become legisla-

tors in their own right. In his celebrated dissenting opinion in **Baker v. Carr**, 369 U.S. 186 (1962), the landmark case thrusting our courts into this political thicket of legislative reapportionment, Mr. Justice Frankfurter forewarned that the incursion by the judiciary into the traditional domain of the legislature would, "invite legislators to play ducks and drakes with the judiciary." 369 U.S. at 286. Justice Frankfurter's words have indeed proven prophetic.

In their drastic departure from the provisional plan the majority not only breaks faith with the Supreme Court of Illinois but in my view seriously misleads the parties to this litigation. This cause came to this panel as a related case—related to the 1965 **Kirby** case, in which the provisional plan was promulgated by this panel and the Illinois Supreme Court. If such drastic relief had been thought possible, surely the parties would have insisted upon a new assignment which would have been their right under our local rule. (See local rule 10, General Rules, Northern District of Illinois). Furthermore, by adopting a wholly new plan the majority also departs from the procedures which we have adopted in the prior related cases of sitting down in pretrial conference with all parties of interest in the hope of establishing an acceptable agreement.

I do not intend to infer that politics have no place in judicial reapportionment. Reapportionment is intrinsically political. But it is one thing to weigh political factors in arranging some districts in an effort to do justice to all and quite another to discard the rights of some in an effort to achieve partisan gerrymandering. I have expressed these views in prior cases. and the same are reported at length by Professor Dixon, "Democratic Representation-Reapportionment in Law and Politics" (Oxford University Press, 1968). In that book Professor Dixon writes:

Chief Judge Campbell's central premise, building out really from Justice Felix Frankfurter's dissenting opinion in Baker v. Carr, seems to be this: Reapportionment is generically a political matter; but having made the crucial decision to enter the political thicket, judges must act as statesmen-politicians, within the safeguards of bipartisan pre-trial conference, in order to do an honest job of reapportionment. At the press conference a reporter noted there had been some comments that Judge Campbell had considered political factors in arranging some districts. The Judge's response was forthright and clear:

> I certainly did; it's a necessary part of trying to work out a fair and balanced set of districts from the standpoint of the interests of each political party. But there is crucial difference between considering political factors in an attempt to do justice to each party in regard to provision of safe and swing districts, and a one-sided partisan political gerrymander for the advantage of one party alone.

I conclude that the plan submitted by the equally bipartisan Illinois Congressional Delegation should be adopted by this court as a fair, just, equitable and mathematically accurate up-dating of our provisional plan to conform to the 1970 census and the one man one vote constitutional principle.

To the extent that the foregoing Findings of Fact, Conclusions of Law and Memorandum disagree with those to be filed by my brethren of this panel, I dissent.

Enter

W. J. CAMPBELL
Senior District Judge

September 21, 1971

APPENDIX B

In the United States District Court for the
Northern District of Illinois
Eastern Division

Sherman H. Skolnick, et al.,
Plaintiffs,
vs.
State Electoral Board of Illinois,
Defendant,
William L. Springer, et al.,
Intervenors.
No. 69 C 755

MEMORANDUM, FINDINGS OF FACT, CONCLUSIONS OF LAW AND INJUNCTION ORDER

Before Castle, Senior Circuit Judge, Campbell, Senior District Judge, and Decker, District Judge.

Castle, Senior Circuit Judge, and Decker, District Judge.

We are asked by the defendant, State Electoral Board of Illinois, under 28 U.S.C. § 1651 and § 2283 and pursuant to Rule 65 of the Federal Rules of Civil Procedure, to restrain and to enjoin the respondents, Joseph Germano, John Alesia, Joseph Cesario, Sam E. Perish and Buddy W. Davis, from proceeding further as petitioners in a recently filed and currently pending original mandamus proceeding in the Supreme Court of Illinois, entitled **People ex rel. Germano, et al. v. Lewis, et al.**, Cause No. 44728. Similar injunctive relief is also sought against Edward V. Hanrahan, State's Attorney of Cook County,

as amicus curiae in that proceeding, John W. Lewis, Secretary of State, Richard B. Ogilvie, Governor, William J. Scott, Attorney General, Alan J. Dixon, Treasurer, Michael J. Howlett, Auditor, James A. Ronan and Victor S. Smith, Chairmen, respectively, of the Democratic and Republican State Central Committees, as respondents in the aforesaid cause in the Supreme Court of Illinois and as members of the State Electoral Board of Illinois.

We entered a restraining order November 5, 1971, maintaining the status quo pending thorough consideration of the issues and to afford full opportunity to the parties and persons above-named to be heard by counsel on the consolidated requests for preliminary and permanent injunction. Having held such further hearing and having heard the arguments of counsel, we conclude that a permanent injunction should now be granted. Mindful of the important and sensitive federal-state relationships necessarily involved in our action, as well as the fundamental questions of judicial comity which must be resolved, we set forth herein the salient facts and legal principles which we deem controlling.

The history of the instant case, **Skolnick v. State Electoral Board of Illinois**, is fully set forth in our order entered September 21, 1971, which is appended hereto. It will be sufficient to summarize those developments which bear directly on the jurisdictional conflict which has arisen and which must be considered in determining the need for and the scope of the permanent injunction. Similarly, we consider briefly the remedy sought by the respondents in the pending motion in their role as petitioners in the original mandamus proceeding in the Supreme Court of Illinois, which, for convenience, we shall hereinafter refer to as **Germano v. Lewis**.

The instant case, **Skolnick v. Electoral Board of Illinois**, came to this court on April 9, 1969, and was as-

signed to the calendar of Judge Campbell. Shortly thereafter a three-judge court was convened pursuant to 28 U.S.C., § 2284. Pursuant to the teachings of **Kirkpatrick v. Preisler**, 394 U.S. 526 (1969), and **Wells v. Rockefeller**, 394 U.S. 542 (1969), we entered an order on December 31, 1969, holding that the existing congressional reapportionment approved by this court in 1965 in **Kirby v. Illinois State Electoral Board**, 251 F.Supp. 908 (N.D.Ill. 1965), was no longer constitutional because of population disparities. We determined at that time that the 1970 congressional election might lawfully proceed under the 1965 plan, contemplating reapportionment of the congressional districts by action of the Illinois General Assembly in time for the 1972 election. In our order we provided:

> "This court assumes that the General Assembly of Illinois will, during its legislative session in the first half of 1971, enact a complete and constitutionally valid plan of reapportionment for election of Members to the United States House of Representatives from Illinois. Defendant is hereby ordered to present to this court on or before July 1, 1971 such duly enacted plan of reapportionment. Upon failure so to do this court shall undertake appropriate relief." 307 F.Supp. at 700.

In the subsequent regular session, which convened in January 1971 and adjourned on June 30, 1971, no new map was adopted by the General Assembly, and in consequence, following full hearing and the submission by the parties and intervenors of proposed maps, we then proceeded to draft a congressional reapportionment plan meeting applicable federal standards and which was set forth and ordered implemented in our order entered September 21, 1971. In so doing we followed the procedure indicated as appropriate in **Reynolds v. Sims**, 377 U.S. 533 (1964). See also, **Roberts v. Babcock**, 246 F.Supp. 396,

399 (D.Mont. 1965), and **Klahr v. Goddard**, 250 F.Supp. 537 (D.Ariz. 1966).

Subsequent thereto, the Illinois General Assembly convened in further session from October 5, 1971, to November 13, 1971, on which latter date, it adjourned until January 1972. Once again the Illinois legislature has failed to perform its duty to enact a constitutional and valid reapportionment plan. There appears no likelihood that it will do so in time for the 1972 congressional elections.

Similarly, no suit in any Illinois state court was filed during the pendency of the instant case prior to the entry of our order of September 21, 1971, which reapportioned the Illinois congressional districts, or which in any manner related to the issues before this court in **Skolnick v. State Electoral Board of Illinois.**

It is in this context of Illinois legislative and judicial non-action that we briefly review the nature and objectives of the original mandamus proceedings pending in the Supreme Court of Illinois.

On October 5, 1971, a motion was filed in the Supreme Court of Illinois by respondents herein Joseph Germano, et al., captioned a "Motion for Leave to File Petition for Supplementary Relief in the Matter of Apportionment of Illinois Congressional Districts and for Substitution and Addition of Parties, or, in the Alternative, Original Petition for Writ of Mandamus." The supplemental relief there sought represented an effort to reinstate and use, as a basis of continuing mandamus proceeding, the earlier case of **People ex rel. Scott v. Kerner**, 32 Ill.2d 539 (1965), in which the Illinois Supreme Court by simultaneous decree approved the redistricting plan adopted and also approved by this court in **Kirby v. Illinois State Electoral Board**, 251 F.Supp. 908, and reserved jurisdiction to assure the use of said plan in the 1966 congressional elections.

The attempted exhumation failed. The supplemental relief was denied by the Illinois Supreme Court on October 14, 1971.

At the same time, however, the Illinois Supreme Court granted leave to Germano, et al., to file their petition for an original mandamus, Cause No. 44728, directing the named respondents therein to answer on or before October 26, 1971, and setting the matter for oral argument on November 9, 1971. Our restraining order intervened, and we are advised that no further proceedings have since occurred.

The petitioners in **Germano v. Lewis** (respondent herein) alleged *inter alia* that mandamus was "necessary to assure that the 1972 Illinois congressional elections take place only pursuant to a plan of congressional reapportionment reviewed and approved by this court. Only in this way can the citizens of Illinois be assured that such reapportionment will be consistent with applicable principles of Illinois law as well as federal constitutional requirements." The moving parties in **Germano v. Lewis** prayed:

> "Wherefore, petitioners pray that a writ of mandamus issue forthwith against the respondent Lewis directing him to immediately take the following action: to advise all persons inquiring about Congressional nominating procedures of this proceeding and inform such persons that no nominating petitions should be circulated, except in Districts yet to be approved by this Court.
>
> "Petitioners further pray that this Court retain jurisdiction of this cause for the purpose of taking such affirmative action as may be necessary to assure that the 1972 Illinois Congressional elections take place only pursuant to a districting plan approved by this Court."

This open and collateral attack upon our order of September 21, 1971, is claimed by respondents' counsel to be warranted by a "unique jurisdiction" in such cases as these, said to be conferred by **Scott v. Germano**, 381 U.S. 407 (1965). It is further asserted that the Illinois Supreme Court should exercise this asserted overriding jurisdiction to assure that effect will be given to "new" Illinois standards said to have been established by the recently adopted Illinois Constitution of 1970. Our review of both **Scott v. Germano**, *supra*, and the new Illinois Constitution demonstrates the error of these contentions and confirms the need to protect our order of September 21, 1971, by appropriate injunction against the possibility of unfounded collateral attack.

Scott v. Germano, *supra*, vacated and remanded **Germano v. Kerner**, 241 F.Supp. 715 (1965), which had invalidated the Illinois State Senatorial reapportionment, consistent with the ruling of the Illinois Supreme Court in **People ex rel. Engle v. Kerner**, 32 Ill.2d 212 (1965). Despite the concurrent state ruling, this District Court refused to grant a motion to stay further action and to allow the state court an opportunity to fashion appropriate relief. The United States Supreme Court said that redistricting by the appropriate state agencies was to be encouraged, and ordered this court to stay its hearing so as to afford Illinois state agencies an opportunity to act. But even under these circumstances, the United States Supreme Court ordered that jurisdiction was to be retained by this court to fashion a "valid reapportionment plan, failing timely state action."

Unlike the instant case, in **Scott v. Germano**, *supra*, no valid reapportionment plan had come into existence by final order of either federal or state court. Unlike that case; here we have made every effort to afford opportunity to the Illinois General Assembly to adopt a constitutionally

effective map over a period extending from December 1969 to September 21, 1971. To accept respondents' contention that there is an overriding and superseding jurisdiction in the Illinois Supreme Court under the facts of this case would be effectively to nullify federal jurisdiction in reapportionment cases. We do not believe this was the intendment of **Scott v. Germano,** *supra.* In that case approximately nine months remained for appropriate redistricting. In the case at bar, after an interval of over twenty months, during which time state agencies were afforded an opportunity to act, the decision of this court issued on September 21, 1971. Nominating petitions are due December 13 to December 30, 1971, a matter of four to five weeks hence. It is now the eleventh hour.

Equally unconvincing are respondents' assertions that new Illinois standards, requiring application by the Illinois Supreme Court, have been established in consequence of the recently adopted Illinois Constitution of 1970. We take judicial notice of that Constitution and particularly of Sections 1, 2 and 3 of Article IV thereof; also of the relevant debates and proceedings of the Sixth Illinois Constitutional Convention which drafted the Constitution. These clearly show that Illinois has not by its Constitution established any standards governing congressional districting but that the new Constitution confines itself to provisions expressly limited to the method of districting the Senate and House of the Illinois General Assembly. Moreover, the teaching of **Davis v. Mann,** 377 U.S. 678 (1964), is particularly appropriate here and is authoritatively dispositive of respondents' argument. In **Mann** the Supreme Court, in addressing itself to the question of the relevance of state standards, said (377 U.S. 678, at 690-91):

> "Appellants' contention that the court below should have abstained so as to permit a state court to decide

the questions of state law involved in this litigation is without merit. Where a federal court's jurisdiction is properly invoked, and the relevant state constitutional and statutory provisions are plain and unambiguous, there is no necessity for the federal court to abstain pending determination of the state law questions in a state court. **McNeese v. Board of Education,** 373 U.S. 668. This is especially so where, as here, no state proceeding had been instituted or was pending when the District Court's jurisdiction was invoked. We conclude that the court below did not err in refusing to dismiss the proceeding or stay its action pending recourse to the state courts."

Respondents' appeal to vague and amorphous considerations of "public policy" in seeking to find new state standards for congressional districting in unrelated provisions of the Illinois Constitution is without merit.

Certain respondents assert herein that a three-judge court was not required to be convened in this case under 28 U.S.C., § 2284. A similar contention in a motion for mandamus and prohibition in the Circuit Court of Appeals for the Seventh Circuit on November 8, 1971, was summarily rejected by a panel of that Court. **Dixon v. Castle,** No. 71-1788. We are satisfied that under proper interpretation of Section 2284 and the nature of the instant case, our three-judge court was properly constituted and had complete jurisdiction.

We are unaware of any reapportionment case brought before a United States District Court which was not in fact heard by a three-judge panel pursuant to that section. The jurisdiction of a three-judge court convened under Section 2284 continues through the grant or denial of the remedy that is sought. **Stout v. Hendricks,** 235 F. Supp. 556, 558 (S.D. Ind. 1964). Jurisdiction to review

any judgment of this three-judge court lies in the United States Supreme Court pursuant to 28 U.S.C., § 1253.

Our brother Campbell has filed herein a vigorous dissent in connection with the restraining order of November 5, 1971. We believe that his dissent rests upon an incorrect reading of the authorities he has cited and overlooks fundamental considerations of comity which should govern the relations of courts.

First and foremost, we regret his charge that the majority would intimidate the Supreme Court of Illinois, for indeed this is not our intent. To the contrary, we seek to maintain a most cordial and respectful relationship with that distinguished court, and we simply desire to avoid any conflict which could result only to the detriment of each tribunal were respondents to continue their effort to place us both upon a collision course.

The situation here is not as it would have been had the jurisdiction of the Supreme Court of Illinois been invoked during the course of our proceedings in the instant case and before the entry of our final order of September 21, 1971. In that context, the teachings of **Germano v. Scott**, *supra*, would have suggested the possibility of abstention, but that certainly is not the posture in which this case existed when Germano, et al., filed their proceeding in the Illinois court. Respondents Germano, et al., sat upon the sidelines throughout the pendency of this case. They offered no assistance to this court, nor did they take any independent action in any state court intended to provide constitutional and timely solutions to the complex problems which we faced in this matter of congressional redistricting.

By now permanently enjoining said respondents, we seek not alone to protect and effectuate our judgment of September 21, 1971, but also to avoid an imposition upon the

Illinois Supreme Court which in this eleventh hour of the preparations for the 1972 congressional elections would bring only grave and irreparable damage were respondents to proceed unrestrained.

We believe that whoever would seek needlessly to create an unseemly conflict between the two courts would evidence indeed a total lack of understanding of the meaning and purposes sought to be served by the principle of comity.

Section 2283 in essence is a statutory enactment of the doctrine of comity. **Wells Fargo v. Taylor**, 254 U.S. 175, 183 (1920); **Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.**, 309 U.S. 4, 8-9 (1940); **Landry v. Daley**, 288 F.Supp. 200 (N.D.Ill. 1968). A Section 2283 injunction in this case would effectuate the doctrine of comity by prohibiting these respondents from drawing the federal and state judicial systems into needless conflict. It would prevent a confrontation which would threaten the integrity of this court's judgment; and it would avoid relitigation of a case fully adjudicated. **Commerce Oil Refining Corp. v. Miner**, 303 F.2d 125, 127 (1st Cir. 1962).

Our brother Campbell has also mistakenly read **Atlantic Coastline Railroad Co. v. Brotherhood of Locomotive Engineers**, 398 U.S. 281 (1970), in which he places much reliance. There are a number of distinguishing aspects of that case; but the marked difference is that the district court there involved had not entered any prior judgment or order which was sought to be protected and effectuated under the express exception of 28 U.S.C., § 2283. In fact that case lends support to our view.

In critically analyzing that decision, it becomes quite clear that it is distinguishable from the case at bar in several respects. First, the district court injunction in that case was designed to nullify an existing state court injunction, while in the case at bar there is no such existing

injunction, and there is, as yet, not even any state court action. Further, in **Atlantic**, the initial district court action only implied that the state court should not act, while the opinion in this case made it quite clear that this court had fully disposed of all of the pending issues. Finally, the Court there points out that "both exceptions to the general prohibition of § 2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or **disposition** of a case as to seriously impair the federal court's **flexibility and authority** to decide that case." (Emphasis ours.)

Likewise, our brother Campbell ignores the major thrust of **Moss v. Burkhart**, 220 F.Supp. 149 (W.D. Okla. 1968), which we submit is a clear authority for our permanent injunction under Section 2283. While it is true that the district court in **Moss v. Burkhart** did defer to the Oklahoma Supreme Court on the simple question of the size of a vote required to adopt an initiative referendum, a public proposal calling for a legislative redistricting commission; that court certainly did not abstain in the matter of protecting its judgment against a collateral and superseding attack sought to be carried forward in the Oklahoma Supreme Court. It is significant that the district court's injunction, preventing all persons from proceeding further in the Oklahoma Supreme Court, was left undisturbed by the United States Supreme Court. See also, **Reynolds v. State Election Board**, 233 F.Supp. 323 (W.D. Okla. 1964).

It is in this context of equitable and jurisdictional considerations that we feel that we are clearly authorized by 28 U.S.C., § 2283 to enter the permanent injunction sought. Furthermore, we believe in the circumstances of this case, it is essential to the protection of the rights of the plaintiffs and all of the citizens of Illinois similarly situated, as well as in the best interests of avoiding an unseemly

conflict, which can only damage the due and effective administration of justice.

Therefore, in view of these equitable and jurisdictional considerations, we enter the following order:

Injunction Order

This matter having come on for further hearing upon this court's order of November 5, 1971, granting defendant, State Electoral Board's motion for a temporary restraining order, and giving leave for the filing of responsive pleadings to defendant's motion on or before November 9, 1971, and setting the consolidated issues of preliminary and permanent injunctive relief requested by said defendant for hearing on November 11, 1971;

This Court Finds, that on September 21, 1971, the three-judge panel of Judges Castle, Campbell and Decker entered its final order in the matter of **Skolnick v. State Electoral Board of Illinois**, 69 C 755, adopting a congressional redistricting plan and ordering the defendant, State Electoral Board of Illinois, to comply with the apportionment plan so adopted, said order having been entered after a full hearing during which evidence was heard and all interested persons or parties were given the opportunity to be heard or testify, and from which order no appeal has been taken; that the said proceedings in this court were well publicized, but neither Edward V. Hanrahan nor any of the petitioners in the **Germano, et al.**, mandamus action sought leave to intervene or appeared before this court in connection therewith.

On or about October 5, 1971, a "Motion for Leave to File Petition for Supplementary Relief in the Matter of Apportionment of Illinois Congressional Districts and for the Substitution and Addition of Parties or, in the Alternative, Original Petition for Writ of Mandamus" was filed with the Clerk of the Illinois Supreme Court by petition-

ers Joseph Germano, John Alesia, Joseph Cesario, Sam E. Perish, and Buddy W. Davis against respondent members of the State Electoral Board of Illinois: Richard B. Ogilvie, Governor; William J. Scott, Attorney General; Alan J. Dixon, Treasurer; Michael J. Howlett, Auditor; James A. Ronan, Chairman, Democratic State Central Committee; and Victor L. Smith, Chairman, Republican State Central Committee, which petition or motions seek to modify, supersede, set aside or nullify the September 21, 1971, order of this court; the relief prayed for being:

> ". . . that a writ of mandamus issue forthwith against the respondent Lewis directing him tc immediately take the following action: to advise all persons inquiring about Congressional nominating procedures of this proceeding and inform such persons that no nominating petitions should be circulated, except in Districts yet to be approved by this Court.
>
> "Petitioners further pray that this Court retain jurisdiction of this cause for the purpose of taking such affirmative action as may be necessary to assure that the 1972 Illinois Congressional elections take place only pursuant to a districting plan approved by this Court."

On or about October 14, 1971, the Supreme Court of Illinois allowed the above-named petitioners leave to file an original petition for mandamus under No. 44728, but did not grant petitioners leave to file a petition for supplementary relief in case No. 39201 (reported as **Scott v. Kerner**, 32 Ill.2d 539 (1965)). Said order of the Illinois Supreme Court directed the respondents to file their answer to the petition on or before October 26, 1971, whereupon petitioners could file their reply on or before November 5, 1971, with oral argument to be heard in Springfield on November 9, 1971.

On or about October 14, 1971, Edward V. Hanrahan, State's Attorney of Cook County, on behalf of himself and

Edward J. Barrett, County Clerk, filed a "Motion for Leave to File and Original Petition for Writ of Mandamus and Supporting Suggestions" with the Clerk of the Supreme Court of Illinois, which petition asked that the Illinois Supreme Court direct the defendant Electoral Board not to conduct an election pursuant to this court's order entered September 21, 1971, and that the Secretary of State be directed to advise any interested persons that; among other things, the districts established by this court are unconstitutional.

On October 26, 1971, pursuant to the order of the Illinois Supreme Court, the members of the State Electoral Board filed their "Answer and Suggestions" with the Illinois Supreme Court, setting out, among other things, that a petition for original mandamus was without authority in that the petition sought a declaratory judgment as to this court's order and that declaratory judgment was not a method of relief subject to the original jurisdiction of the Supreme Court of Illinois. The "Answer" further pointed out that the petition was filed after the entry of our order and would be determined only one month from when candidates' nominating petitions were to be filed. Said "Answer" also makes the observation that the new Constitution of Illinois is totally silent as to congressional districts or redistricting, contrary to the allegations of petitioners that new Illinois standards governing congressional districting had been established by said Constitution of 1970.

On October 27, 1971, the Clerk of the Supreme Court of Illinois issued a letter to the Honorable Edward V. Hanrahan informing him that the Supreme Court of Illinois had denied his petition, filed on behalf of himself and Edward J. Barrett, for an original writ of mandamus; however, leave was given to Mr. Hanrahan to appear as amicus curiae in case No. 44728 filed by petitioners Joseph Germano, et al.

In addition to the parties and movants herein or their attorneys, Edward V. Hanrahan and Joseph Germano, et al., were represented by their counsel and heard by this court, and John E. Cassidy, though not a party or intervenor to this matter, was given leave to argue to this court as a private attorney on behalf of Alan J. Dixon, Michael J. Howlett, James A. Ronan, as individuals, which he declined to do, with regard to the motion for a preliminary or permanent injunction.

This court finds that the matter of congressional redistricting is one of general public importance and that the issues raised herein are of vital importance to the people of Illinois and to the many persons who may desire to seek election to the House of Representatives of the United States Congress from Illinois and the supporters of such candidates. We also take judicial notice of the fact that all candidates and their supporters must make their campaign plans well in advance of filing dates for nominating petitions and that the minority group or independent candidates are faced with a more difficult burden of advance preparation than that of the two established political parties.

This court finds that the case of **Scott v. Germano**, 381 U.S. 407 (1965), is not applicable to **Skolnick v. State Electoral Board**, 69 C 755, for the many reasons set out in our memorandum. We also find that the principle of concurrent jurisdiction does not affect our judgment under the facts and circumstances of this case and that having deferred remedial action to the state agencies for a considerable length of time and until we could wait no longer, that there is no requirement that our judgment be reviewed by the Illinois Supreme Court.

We find that 28 U.S.C. §§ 2283 and 1651 provide ample authority for the entry of a temporary restraining order and, upon further hearing, a permanent injunction under

the circumstances of this case. We recognize that caution and discretion are the watchwords of § 2283, but on balance, we find the necessity and duty to provide Illinois with an orderly electoral process far outweigh any objections to invoking this section.

We take judicial notice of the ten year history of inaction by the Illinois legislature with regard to congressional redistricting; the in-court admission before this panel by a member of the Illinois House of Representatives that redistricting by the legislature in the near future is unlikely; the fact that the legislature adjourned its fall term on November 13, 1971; that the Illinois Constitution (1970) does not require the legislature to reconvene until the second Wednesday of January, 1972; and that no congressional redistricting plan formulated by the Illinois General Assembly is likely to be enacted and become law in time for compliance with the filing dates for nominating petitions for the March 1972 primary election.

We conclude that this court was properly convened, and upon a finding of unconstitutionality as to the 1965 congressional district plan and absent timely remedial action by an agency of the State of Illinois, it was our duty to effect a plan to replace what had been found invalid, and that once adopted said plan must govern the election of United States Representatives from Illinois until the Illinois General Assembly does in fact timely adopt its own constitutional plan. We further conclude that irreparable injury to the people, electors, candidates and their supporters would result if we did not permanently enjoin the subject of this order and see that our order of September 21, 1971, is carried out.

It Is Hereby Ordered, therefore, that all parties and the amicus curiae in the matter entitled **People ex rel. Joseph Germano v. John W. Lewis**, No. 44728, in the Supreme Court of Illinois, specifically Joseph Germano,

John Alesia, Joseph Cesario, Sam E. Perish and Buddy W. Davis, petitioners, Edward V. Hanrahan, amicus curiae, John W. Lewis, Secretary of State, Richard B. Ogilvie, Governor, William J. Scott, Attorney General, Alan J. Dixon, Treasurer, Michael J. Howlett, Auditor, James A. Ronan, Chairman, Democratic State Central Committee, and Victor L. Smith, Chairman, Republican State Central Committee, respondents and members of the State Electoral Board of Illinois, their officers, agents, employees and attorneys and all other persons having knowledge of this court's order herein, be, and are hereby, permanently restrained and enjoined from further proceeding in the above-entitled action now before the Illinois Supreme Court or from filing any new actions affecting the matters herein in issue or in any way interfering with the electoral process applicable to congressional elections or the terms of our order of September 21, 1971, above referred to, and all persons are restrained and enjoined from taking any actions designed to or which will have the effect of interfering with the carrying out of said order, except as may be provided by law for the appeal of the order of September 21, 1971, or this order to the Supreme Court of the United States.

It Is Further Ordered that the defendant, State Electoral Board of Illinois, its successor or successors, and all those acting by and under its authority, are hereby ordered and directed to accept filings and conduct elections, only in accordance with the provisions of the September 21, 1971, order of this court adopting a congressional redistricting plan, and in conformity with the election statutes of the State of Illinois which are not inconsistent therewith. The said Board and those acting by and under its authority are enjoined from accepting filings otherwise than in conformity with said order, from declaring the results of any such election held otherwise than in conformity with the said order of this court.

Jurisdiction is retained for the purpose of making any further orders deemed necessary to insure the effectuation of our order adopting a congressional redistricting plan, and this order permanently enjoining interference with said redistricting plan.

Senior Judge Campbell objects to the entry of this order and dissents therefrom.

Dated this 15th day of November, 1971.

Enter:

LATHAM CASTLE
Senior Circuit Judge

BERNARD M. DECKER
District Judge

Memorandum, Findings of Fact, Conclusions of Law on Defendants' Motion for Permanent Injunction

Campbell, Senior Judge dissenting:

As was revealed at the hearing on this motion on November 11th, I took the position in the conference of this judicial panel immediately following the initial hearing last September that the only action this court could or should take was to approve the one plan based upon numerical up-dating of our original plan of 1965 to achieve constitutional numerical equality in its Congressional districts. I further proposed at that conference to submit such plan once again to the Illinois Supreme Court for joint promulgation by both courts, exactly as the same two courts did with the original re-apportionment of the same Congressional districts in 1965 (251 F.Supp. 908, 33 Ill. 2nd 460). I still conclude and here reiterate that the foregoing represents the limit of our jurisdic-

tion in this particular re-apportionment case regardless of what greater jurisdiction might possibly exist in some other case lacking the dual jurisdictional precedent confronting us here.

I warned my brothers of this panel in that same conference last September that to do otherwise would not only exceed our authority but would upset perhaps permanently the outstanding comity that has always existed, not only in re-apportionment but in all matters, between the courts of the State of Illinois and this court ever since its creation by the Congress. From all that I saw and heard from both sides of the bar at the hearing just concluded this unfortunate result has been achieved by the injunction issued herein by the majority over my continuing dissent.

In support of my objections to the unwarranted and imperious action taken by my brothers I here re-adopt without restatement all of the findings and conclusions contained in my memoranda of September 21st and November 10th herein. I hereby further find and conclude that Section 2283 as construed by the courts has never sanctioned a federal court injunction against state judicial activity merely on the possibility of conflicting impact of final state and federal orders, which is the ground relied upon by my brothers for this mischievous injunction. **Atlantic Coastline Railroad v. Brotherhood of Locomotive Engineers**, 398 U.S. 281 clearly teaches that even where, as in that case, the final orders of state and federal courts are directly in opposition (a situation which the majority seems only to guess might happen here) a federal restraint upon the state is forbidden because the pathways leading to the conflicting orders are distinct. (See also application of the **Atlantic Coastline** dichotomy to re-apportionment in **Moss**, 220 F.Supp. 149 and **Lomenzo**, 238 F. Supp. 916). In our case we clearly have such separate

considerations to be undertaken by this court and by the Supreme Court of Illinois. Indeed, my brothers themselves so find when they hold in their memorandum of September 21st (pp. 6 and 7) herein that the vital issues of contiguity and compactness of Congressional districts are beyond federal judicial determination. Of course these issues, indispensable to valid reapportionment, belong solely to the State **(Reynolds v. Sims**, 377 U.S. 533 at pp. 578 and 579), and in our case can only be determined by the Supreme Court of Illinois whose hands the majority seek by their injunction to tie in defiance of the teachings of **Atlantic Coastline** (Supra).

I protest and I dissent!

Enter:

W. J. CAMPBELL
Senior Judge

November 15, 1971

APPENDIX C

In the United States District Court
for the Northern District of Illinois
Eastern Division

Sherman H. Skolnick and Harriet Sherman, Plaintiffs, vs. State Electoral Board of Illinois, Defendant.	Civil Action 69C 755.

COMPLAINT

The plaintiffs, Sherman H. Skolnick and Harriet Sherman, complain against the defendant, State Electoral Board of Illinois, and allege:

1. This Court has original jurisdiction of this action, and the plaintiffs have the right to bring this suit, under Title 42, United States Code, Sections 1983 and 1988.

Also, this Court has jurisdiction under Title 28, United States Code, Section 1343.

Relief is also sought pursuant to the Federal Declaratory Judgment Act, Title 28, United States Code, Section 2201 and 2202.

2. The plaintiffs do not invoke the jurisdiction or power of any judge, court executive committee, or other such group or person, who intend, or would intend, to determine and adjudicate this case in secret and *in camera*, without notice to plaintiffs or public hearing, without fair play and due and orderly processes of law.

Insofar as any such judge, court executive committee, or other such person or group, would purport to proceed nevertheless to determine this case in secret, as aforementioned, plaintiffs would withhold this Complaint from such judge or other person, and declare them to be trespassers in the premises of this Complaint.

3. Plaintiffs believe they cannot obtain a fair and impartial hearing and adjudication of this controversy by any of the present District Judges in the Northern District of Illinois, for reasons, among others, that they are members of the Citizens' Committee to Clean Up the Courts and actively engaged in research and investigation of court malpractices and corruption in this judicial district.

4. The plaintiffs are citizens and taxpayers of the United States and of the State of Illinois, and as qualified voters in said State are entitled to vote for U.S. Representatives to Congress. Plaintiffs reside in the present 2nd Illinois Congressional District.

Plaintiff Sherman H. Skolnick resides at 9800 South Oglesby, Chicago, Illinois; plaintiff Harriet Sherman resides at 7119 South Crandon, Chicago, Illinois.

5. Plaintiffs bring this suit on behalf of themselves and on behalf of all other voters, residents, citizens, taxpayers, and persons similarly situated.

6. The defendant, State Electoral Board of Illinois, has a legal representative in the City of Chicago, and said representative has an office in said City.

7. The defendant, State Electoral Board of Illinois certifies to the county clerks of the counties of Illinois the names of candidates for the office of U.S. Representative to Congress and other offices and their position on the primary ballot, canvasses the votes given for U.S. Representatives to Congress and other candidates, declares the

winning candidates for such offices and performs other official functions in connection with Illinois elections.

8. That the remapping plan for Illinois Congressional Districts, 1965, provides for the following districts:

District*	Population	1960 Census	District	Population	1960 Census
D 1. Dawson	409,195	−2.6%	R 13. Rumsfeld	407,052	−3.1%
D 2. Mikva	425,454	+1.3%	R 14. Erlgenborn	439,182	+4.6%
D 3. Murphy	429,267	+2.2%	R 15. Reid	410,650	−2.2%
R 4. Derwinsky	415,838	−1.0%	R 16. Anderson	394,481	−6.1%
D 5. Kluczynski	401,862	−4.3%	R 17. Arends	428,519	+2.0%
D 6. Ronan	420,109	+0.1%	R 18. Michel	401,503	−4.4%
D 7. Arrnunzio	416,712	−0.8%	R 19. Railsback	410,402	−2.3%
D 8. Rostenkowski	451,527	+7.5%	R 20. Findley	401,919	−4.3%
D 9. Yates	451,042	+7.4%	D 21. Gray	417,760	−0.5%
R 10. Collier	433,935	+3.2%	R 22. Springer	441,332	+6.4%
D 11. Pucinski	450,884	+7.3%	D 23. Shipley	412,709	−1.9%
R 12. McClory	394,714	−6.0%	D 24. Price	415,110	−0.9%

That examples of disparities between said Congressional Districts are as follows: (a) The disparity between the smallest district, the 16th, with 394,481 population, to the largest, the 8th, with 451,527, is 57,046.

(b) The largest district, the 8th, is in Chicago, as compared to the smallest downstate district, the 18th, with 401,503 population, a difference of 50,024.

9. That said re-map plan of 1965 does not meet the Constitutional standards pronounced by the Supreme Court of the United States, in that, among other things:

(a) There has been no good faith effort by the State to achieve precise mathematical equality and to draw Congressional districts of equal population, as nearly as practicable.

(b) The State has shown no reason for the disparities between said Illinois Congressional districts, and that said districts do not give equal representation to equal numbers of people.

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* The Party label (D or R) and the names of 1969 encumbent Congressmen and not in the Complaint as filed.

(c) The State must justify each variance between the Illinois Congressional districts, irrespective of percentages of disparity, however large or small. People vote, percentages do not vote.

(d) That under said 1965 plan, the vote, and right to vote, of plaintiffs, and others similarly situated, is devalued, debased, and diluted, without justification. Thus, plaintiffs, and others in the 2nd Congressional District, have one Congressman for 425,454, whereas, in the 16th Congressional District, there is one Congressman for 394,481 people.

10. The rights of the plaintiffs, and of all others similarly situated, can be protected only by a decree of this Court declaring the said aforementioned 1965 plan void and unconstitutional, and restraining the defendant State Electoral Board of Illinois from proceeding with the 1970 Congressional Elections or any special election, pursuant to said provisions.

11. The plaintiffs have no adequate remedy other than the judicial decree sought herein. Since the arbitrary and discriminatory provisions complained of are imposed by the aforementioned 1965 Congressional remap plan, only a judicial decree can remedy these provisions within a reasonable time.

Wherefore, in view of the aforesaid, the plaintiffs, Sherman H. Skolnick and Harriet Sherman, respectfully request:

That this Court take jurisdiction of this matter and declare the rights of the plaintiffs pursuant to Title 28, United States Code, Section 2201, in the premises, to-wit:

(a) That the 1965 Illinois Congressional District remap plan be declared void and unconstitutional according to

the standards set forth by the Supreme Court of the United States, in that plaintiffs, and others similarly situated, are deprived of equal representation for equal numbers of people,

And further, the plaintiffs request that the Court grant further relief in accordance with 28 U.S.C., Section 2202, as follows:

(b) To restrain the defendant, State Electoral Board of Illinois, from certifying any election results, canvassing any votes, and printing, mailing, or otherwise distributing, or causing to be printed, mailed or otherwise distributed, any election material prepared pursuant to said 1965 remap plan, all with respect to primary, general, or special elections for the office of U.S. Representative to Congress.

(c) That if by September 1, 1969, there has been a failure to submit to this Court a new Illinois Congressional remap plan, which plan complies with the Constitutional standards set forth by the Supreme Court of the United States, and shows constitutionally acceptable justification for variances, if any, in said districts under said new plan; then, that this Court Order at-large elections in Illinois for the office of United States Representative to Congress.

(d) Or in the alternative, that this Court order a special Commission, made up of Illinois residents not presently public officials but including both laymen and mathematicians, to draw up a constitutionally acceptable Illinois Congressional District re-map plan, and to have the same submitted to this Court in time for the 1970 election and not waiting for the 1970 census figures.

The plaintiffs further request that this Court:

(e) Should retain jurisdiction of this cause on such basis as this Court may seem just and proper.

(f) Should grant such other and further relief as may seem just and proper.

/s/ SHERMAN H. SKOLNICK
Plaintiff

/s/ HARRIET SHERMAN
Plaintiff

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PL 2-3083
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APPENDIX D

United States District Court
Northern District of Illinois
Eastern Division

Sherman H. Skolnick and Harriet Sherman, Plaintiffs, vs. State Electoral Board of Illinois, Defendant.	No. 69 C 755.

ORDER

This case having been assigned to my calendar by the Executive Committee and it being clear from the complaint that the matter must be determined by a Three Judge Court pursuant to the provisions of Title 28 U.S.C., §§ 2281, and 2284, accordingly, I have notified the Chief Judge of the Seventh Circuit Court of Appeals, who shall designate two other judges, at least one of whom shall be a Circuit Judge, to serve as members of the Court and hear and determine this matter.

All motions or any other pleadings or petitions shall be taken under Rule 13 and shall be in writing and submitted in triplicate.

Enter

W. J. CAMPBELL
Chief Judge.

Dated: April 10, 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-999

ALAN J. DIXON, Treasurer of the State of Illinois, et al.,
Petitioners,

vs.

THE HONORABLE LATHAM CASTLE, Senior Circuit Judge, et al.,
Respondents.

Appeal from the Circuit Court of the United States Seventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. SCOTT,
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Assistant Attorneys General,
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Respondents.

Appeal from the Circuit Court of the United States Seventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Richard B. Ogilvie, Governor, John W. Lewis, Secretary of State, William J. Scott, Attorney General, and Victor L. Smith, individually and as members of the State Electoral Board of Illinois, oppose the Petition for Writ of Certiorari for the reasons which follow.

STATEMENT OF THE CASE

These Respondents disagree in part with Petitioners' Statement of the Case, both as to its editorial treatment of Petitioners' personal views and certain alleged facts which are in error.

There has been no finding or order of any court which would justify Petitioners' characterization of the September 21, 1971 decree as having "reversed" the 1965 consent decree entered without the benefit of current census data.

Petitioners state that five proposals for redistricting were presented, but Petitioners' own reference [A-4] [A-5] to the September 21, 1971 decree indicates that only four plans were before the court and that each district in the plans varied less than one percent from the ideal district population.

Petitioners proceed to state the case by establishing themselves as soothsayers, speculating that a certain proposed redistricting plan would have produced a political balance, which not only fails to be a "fact" but is not even germane to this appeal.

Finally, Petitioners erroneously allege restraint of Art. I §4 of the Constitution of the United States when in fact the injunction Petitioners refer to clearly states:

> . . . that once adopted said plan must govern the election of United States Representatives from Illinois *until the Illinois General Assembly does in fact timely adopt its own constitutional plan.* (emphasis added)

ARGUMENT

I.

The Issue Presented

Petitioners present only one very narrow issue to this Court, namely: should the Seventh Circuit Court have granted the extraordinary emergency relief sought by these Petitioners when hearings were being conducted as to certain Respondents' motion for injunctive relief?

Discretionary Writs of Mandamus and Prohibition were sought by Petitioners, together with an Emergency Application for Injunction, but the Seventh Circuit found "no merit to (the) suggestion that Judge Campbell was not required to convene a three-judge court. . . ." The Seventh Circuit in its discretion, (which Petitioners never allege was abused) denied the requested extraordinary writs of injunctive relief sought by Petitioners.

II.

Prior Conduct of Petitioners and Respondents

It must be noted that Petitioners, like some of the Respondents, are members of and constitute the State Electoral Board of Illinois and by operation of both the 1870 and 1970 Constitutions of Illinois the Attorney General of Illinois is *the* Constitutional legal officer who must represent such public officers in their *official* capacities or in the *Skolnick* matter here in question, only the Attorney General is authorized to represent the defendant Board. [See *Fergus* v. *Russel*, 270 Ill. 304 (1915) and Article V §15 Illinois Constitution (1970).]

During all hearings in conjunction with the redistricting order entered September 21, 1971 by the three-judge

District Court and prior thereto the Attorney General did represent the defendant State Electoral Board of Illinois. Prior to said hearings no member or members, Petitioners or Respondents, of said Board submitted proposals to the court to assist it in performing the task of Congressional redistricting. Counsel for these Petitioners did not attend the hearings conducted by the District Court on proposals submitted to it by Plaintiff and certain intervenors. Leave was granted to those interested persons who wished to support or oppose plans then being considered by the court, but during said hearings no member or members of said Board expressed their individual views as to what the court should do.

Subsequent to the September 21, 1971 redistricting order said defendant Board did not elect to appeal the decision of the three-judge court and no such appeal was authorized. Nor did these individual Petitioners ask the Attorney General to take an appeal of that decision.

III.

The Seventh Circuit Order

The Seventh Circuit told these Petitioners and their private attorney to seek their emergency and extraordinary relief in the Supreme Court of the United States, which they apparently did in *Dixon* v. *Skolnick*, Application No. A-578 to this Court, but which application was denied December 14, 1971. Petitioners now seem to want a second or third bite of the apple and ask this Court to order the Seventh Circuit to reconsider its denial of extraordinary and emergency relief. But to return this matter to the Seventh Circuit now would in effect be an order to the Seventh Circuit to render an advisory opinion upon a moot issue in conjunction with the Petitioners' request for

discretionary relief. Petitioners' request also would thrust both this Court and the Seventh Circuit into a political thicket unnecessary in law or in fact.

IV.

Prior Litigation and the Skolnick Decision

Unlike *Kirby v. Illinois Electoral Board*, 251 F. Supp. 908 (N.D. Ill. E.D. 1965) there were neither "opposing political factions of the State Electoral Board", nor a consent decree in *Skolnick v. Illinois Electoral Board*, No. 69 C 755 (N.D. Ill. E.D. 1971). In fact the Defendant Illinois Electoral Board in the *Skolnick* case was a nominal party and played a passive role in the case. Now Petitioners make the prognostication that a certain number of "safe" Republican districts are created by redistricting, but this cannot even be an issue when the nature of this Petition is considered, i.e., a review of the Seventh Circuit denial of extraordinary relief. It is just as likely that the new districts will produce an even split in party representation, but this is for the voters, not the courts to determine.

V.

The Three Judge Court

As to the collateral issue of whether three judges or one are required to determine statewide redistricting issues, these Respondents respectfully submit that this is in fact no issue at all. Every reported case in the federal courts which deals with statewide redistricting has been decided by a three-judge court. But even in the cases deciding issues totally unrelated to redistricting, the decision has never been that a three-judge order which should have been rendered by a single judge is void. Rather, such an order

is to be appealed, if at all, to the Circuit Court instead of the United States Supreme Court.

Petitioners themselves claim the 1965 *Kirby* case was a provisional decree resulting from a challenge to the 1961 Illinois redistricting statute, Ch. 46, § 156.f.1 Ill. Rev. Stat. (1963). It is totally illogical to contend that the proper convocation of the three-judge court in *Kirby* which declared the Illinois redistricting statute unconstitutional, must now be ignored and that the same three-judge panel must be denied authority to revise their decree in light of newly defined Constitutional standards. Even if the *Kirby* and *Skolnick* cases be treated as entirely independent of one another the fact remains that the *Kirby* decision replaced an Illinois statute, virtually to the same effect as if the State legislature had so acted. Thus, in this manner the *Skolnick* case represents a challenge to the judicial substitute for a state statute. The importance and magnitude of Congressional redistricting, together with the short time available from the taking of the census to creation of a new ten year plan, are also compelling reasons to continue three-judge court redistricting subject to direct United States Supreme Court review.

CONCLUSION

Petitioners have failed to present a substantial federal question and do not properly present an appeal on the merits. They ask this Court to decide whether the Seventh Circuit should have granted extraordinary relief, but the granting of such relief is discretionary and in this case, moot. Respondents respectfully urge that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Attorney for Certain Respondents

FRANCIS T. CROWE,
ROBERT A. TINGLER,
Assistant Attorneys General,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

Supreme Court, U.S.
FILED
MAR 6 1972
E. ROBERT SEAVER, CLERK

No. 71-999

ALAN J. DIXON, Treasurer of the State of Illinois; MICHAEL J. HOWLETT, Auditor of Public Accounts of Illinois; and JAMES A. RONAN, Chairman of the Democratic State Central Committee of Illinois, as Individuals and in Their Capacity as Members *Ex Officio*, Who With Others Constitute the State Electoral Board of Illinois,

Petitioners,

vs.

THE HONORABLE LATHAM CASTLE, Senior Circuit Judge, THE HONORABLE WILLIAM J. CAMPBELL, Senior District Judge, and THE HONORABLE BERNARD M. DECKER, District Judge and THE HONORABLE THE UNITED STATES DISTRICT COURT for the Northern District of Illinois, Eastern Division; SHERMAN H. SKOLNICK; RICHARD B. OGILVIE, Governor of Illinois; JOHN W. LEWIS, Secretary of State of Illinois; WILLIAM J. SCOTT, Attorney General of Illinois; and VICTOR J. SMITH, Chairman of the Republican State Central Committee of Illinois, Both Individually and as Members *Ex Officio*, Who Also Constitute the State Electoral Board of Illinois; W. ROBERT BLAIR, Speaker of the Illinois House of Representatives, HENRY J. HYDE, Majority Leader of the Illinois House of Representatives, and EDWARD MADIGAN, Chairman of the Committee on Reappointment of the Illinois House of Representatives; et al.,

Respondents.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JEROME H. TORSHEN,
11 South LaSalle Street,
Chicago, Illinois 60603,

Attorney for Respondents, W. Robert Blair, Speaker of the Illinois House of Representatives, Henry J. Hyde, Majority Leader of the Illinois House of Representatives, and Edward Madigan, Chairman of the Committee on Reapportionment of the Illinois House of Representatives.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-999.

ALAN J. DIXON, Treasurer of the State of Illinois; MICHAEL J. HOWLETT, Auditor of Public Accounts of Illinois; and JAMES A. RONAN, Chairman of the Democratic State Central Committee of Illinois, as Individuals and in Their Capacity as Members *Ex Officio*, Who, With Others Constitute the State Electoral Board of Illinois,

Petitioners,

vs.

THE HONORABLE LATHAM CASTLE, Senior Circuit Judge; THE HONORABLE WILLIAM J. CAMPBELL, Senior District Judge, and THE HONORABLE BERNARD M. DECKER, District Judge and THE HONORABLE THE UNITED STATES DISTRICT COURT for the Northern District of Illinois, Eastern Division; SHERMAN H. SKOLNICK; RICHARD B. OGILVIE, Governor of Illinois; JOHN W. LEWIS, Secretary of State of Illinois; WILLIAM J. SCOTT, Attorney General of Illinois; and VICTOR J. SMITH, Chairman of the Re-Members *Ex Officio*, Who Also Constitute the State Electoral Board of Illinois; W. ROBERT BLAIR; Speaker of the Illinois House of Representatives, HENRY J. HYDE, Majority Leader of the Illinois House of Representatives, and EDWARD MADIGAN, Chairman of the Committee on Reappointment of the Illinois House of Representatives; et al.,

Respondents.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR RESPONDENTS, W. ROBERT BLAIR, SPEAKER OF THE ILLINOIS HOUSE OF REPRESENTATIVES, HENRY J. HYDE, MAJORITY LEADER OF THE ILLINOIS HOUSE OF REPRESENTATIVES, AND EDWARD MADIGAN, CHAIRMAN OF THE COMMITTEE ON REAPPORTIONMENT OF THE ILLINOIS HOUSE OF REPRESENTATIVES, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents, W. Robert Blair, Speaker of the Illinois House of Representatives, Henry J. Hyde, Majority Leader of the Illinois House of Representatives, and Edward Madigan, Chairman of the Committee on Reapportionment of the Illinois House of Representatives (hereinafter "these respondents"), respectfully pray that this Court deny the Petition for a Writ of Certiorari to review the order of the United States Court of Appeals for the Seventh Circuit, entered on November 8, 1971, by which order said Court denied petitioner's application for the issuance of extraordinary writs of mandamus and prohibition and petitioner's emergency application for injunction pending review by such extraordinary writs.

OPINION BELOW.

The order of the Court of Appeals for the Seventh Circuit is reprinted at page 3 of the Petition for Writ of Certiorari.

JURISDICTION.

Although the Petition for Certiorari was filed within ninety days of the order of November 8, 1971, the Court's *certiorari* jurisdiction is not properly invoked.

QUESTIONS PRESENTED.

The Questions Presented in the Petition do not state the issues required to be resolved by the Court on its consideration of the Petition for Writ of Certiorari. Properly stated, the Questions Presented are:

1. Did the Court of Appeals for the Seventh Circuit

abuse its discretion in denying petitioner's application for the extraordinary writs of mandamus and prohibition, which writs were sought (a) to review judgments or orders entered in the United States District Court and (b) to enjoin certain additional trial court proceedings.

2. Should this Court review the denial of petitioner's application for extraordinary writs and emergency relief which would have prevented the District Court from acting, when this matter comes to this Court after the District Court has, in fact, acted and the issue has become moot.

3. Should this Court, in any event, grant a Petition for Writ of Certiorari which overtly seeks to embroil the Court in political questions and to cause the Court to decide issues which, as petitioner states, "rage around partisan political advantage." (Petition, p. 21.)

STATEMENT OF THE CASE.

Petitioner does not adequately state the facts necessary to a consideration of the instant Petition for Writ of Certiorari.

Briefly, a three-judge court, in *Kirby* v. *Illinois Electoral Board*, 251 F. Supp. 908 (N. D. Ill., E. D. 1965), entered a provisional apportionment decree on December 8, 1965, to govern subsequent Illinois congressional elections pending action by the Illinois Legislature. In 1969, *Skolnick* v. *State Electoral Board of Illinois* was filed seeking supplementary relief on the ground that the reapportionment under the provisional decree failed to meet constitutional standards. (Petition, A. 48ff.)

Thereafter, as no action was taken by the Illinois Legislature, the three-judge court which had entered the 1965 provisional decree directed that hearings be held to enable

a constitutionally valid map to be formulated for the 1972 Illinois congressional elections. The three-judge court invited all interested parties who might wish to do so to submit proposals and to present evidence. After evidentiary hearings in which a variety of parties and interest groups participated, the three-judge court, on September 21, 1971, by a 2-1 vote, adopted a provisional congressional reapportionment plan for Illinois, again to be used pending action by the Illinois Legislature.

At the time of the 1965 proceedings, the Illinois Electoral Board (the "Board"), which is made up of members of both political parties, apparently could not adequately function as a unit. Thus, the Democratic and Republican members of the Board were represented by separate counsel. John E. Cassidy, Jr., (hereinafter "Cassidy"), counsel for petitioners here, was retained to represent the Democratic members of the Board. Between 1965 and 1969 when the supplementary Skolnick complaint was filed, the composition of the Board changed. Although the Board still was comprised of members of both major political parties, there did not appear to be division among its members at the time that the three-judge court heard evidence in the supplementary proceedings. The Board in its entirety was represented by the Illinois Attorney General. There is nothing of record to demonstrate that any of the members of the Board were dissatisfied with or objected to the representation furnished by the Attorney General. The Board, through the Attorney General, took part in the evidentiary proceedings before the three-judge court.

Cassidy, who had represented those members of the Democratic party who were members of the Board in 1965, did not seek to, nor did he, appear on anyone's behalf during the evidentiary hearings on the Skolnick complaint. It was only after the conclusion of the hearings and subsequent to the entry of the September 21, 1971, decree which

resulted therefrom that Cassidy again sought to interject himself into the proceedings on behalf of certain members of the Board by filing a Notice of Appeal. Moreover, Cassidy and various other persons ostensibly not associated with him sought to collaterally attack the September 21, 1971, decree of the three-judge court by seeking extraordinary writs in the Illinois Supreme Court, to the end that a decree creating a different reapportionment plan than that promulgated by the three-judge court would be issued and a conflict generated between the state and federal courts.

Because of the harm to the electoral process which would have been caused by conflicting decrees and to protect the jurisdiction of the three-judge court, motions were made to the three-judge court by various of the parties properly before it, including these respondents, to enjoin the proceedings before the Illinois Supreme Court. Notice of these motions for injunction were given to all of the persons involved in the Illinois Supreme Court proceedings as well as to each of the Justices of that Court. Cassidy was aware of the injunction proceedings. Immediately before arguments were to commence before the three-judge court on applications for a temporary restraining order, Cassidy filed with the United States Court of Appeals for the Seventh Circuit the application for writs of mandamus and prohibition and an emergency application for injunction pending review by extraordinary writ, which are the subject of the instant Petition for Writ of Certiorari. By his applications, Cassidy sought to "stay all further proceedings" of the three-judge court and to review the decree entered on Septembr 21, 1971, which ordered a provisional reapportionment of the State of Illinois for the congressional elections of 1972.

The Court of Appeals denied Cassidy's "application for an extraordinary writ, and the emergency application for

injunction pending review." Thereafter, the three-judge court, on various dates, held hearings on the motions to restrain and enjoin proceedings before the Illinois Supreme Court and eventually entered a permanent injunction.*

Cassidy here seeks review of the order of the Court of Appeals which denied his applications for extraordinary relief which would have, in effect, enjoined the now terminated proceedings for injunction held before the three-judge court.

ARGUMENT.

Petitioners seek review of the denial by the Court of Appeals of their applications for extraordinary writs and emergency relief which applications were addressed to the sound discretion of the Court of Appeals. The relief sought from the Court of Appeals, insofar as it related to the pending District Court proceedings, was interlocutory in nature in that it sought to prevent hearing by the District Court on pending motions.

The Court of Appeals did not purport to make final disposition of the merits of the controversy concerning which petitioners sought relief. This Court will not usually grant certiorari to review a non-final order. As stated in *American Construction Co.* v. *Jacksonville, T. & K. R. Co.*,

* These matters have previously been before this Court as follows: *Edward V. Hanrahan, et al.* v. *Skolnick, et al.*, Application No. A-488, Motion to Stay Injunction, which was denied by order dated November 12, 1971; *Alan J. Dixon, et al.* v. *Sherman H. Skolnick, et al.*, Application No. A-578, Emergency Application for Stay and Other Relief Pending Appeal from the United States District Court of Illinois, Eastern Division and Petition for Writ of Certiorari to the United States Court of Appeals, Seventh Circuit, which was denied by order dated December 14th, 1971; *Edward V. Hanrahan* v. *State Electoral Bd. of Illinois, et al.*, Application No. A-516, Motion to Stay Injunction and Prior Order of United States District Court, Northern District of Illinois, Eastern Division, and for Injunction Pending Appeal, which was denied by order dated November 19, 1971; and *Joseph Germano, et al.* v. *State Electoral Bd. of Illinois*, Application No. A-523, which was denied by order dated November 19, 1971.

148 U. S. 372, 384, "This court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." See *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, 584-5; *Cobbledick* v. *United States*, 309 U. S. 323, 324-325; *Hamilton-Brown Shoe Co.* v. *United States*, 240 U. S. 251, 258 (lack of finality "of itself alone furnished sufficient ground for the denial").

Review on the instant Petition is not necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause. In fact, subsequent to the denial of petitioners' applications for extraordinary writ, the District Court *proceeded to hearing* and entered temporary and, eventually, permanent decrees. In such circumstances, the alleged controversy sought to be resolved by this Petition from the denial of orders of the Court of Appeals is moot. As the controversy raised by this Petition has become academic by reason of changing circumstances, this Court's jurisdiction should not be exercised.

Petitioners in essence brought a proceeding in the Court of Appeals to enjoin action by the District Court. The District Court has now acted. An injunction proceeding becomes meaningless if the act sought to be enjoined has irretrievably occurred. See *Brownlow* v. *Schwartz*, 261 U. S. 216, *Richardson* v. *McChesney*, 218 U. S. 487, *Fortson* v. *Toombs*, 379 U. S. 621.

The mootness of the instant matter did not deprive petitioners of a remedy by review. Proper avenues remained open to petitioners if they had seen fit to act in an orderly manner. In these circumstances, there is no showing that the Court of Appeals abused its discretion in rejecting petitioners' application.

Petitioners point to no valid reason which might motivate this Court to exercise its certiorari jurisdiction. Such jurisdiction should not be exercised where petitioners sought merely discretionary relief in the court below, and where error of the trial court, if any, could have been reviewed by conventional means.

Petitioners' resort to extraordinary means for review on a necessarily abbreviated record reflects their doubtful standing. The facts demonstrate that Cassidy, at this stage of the proceedings, is an interloper. The whole issue of standing is ignored in the Petition. In such circumstances, this Court should not grant this Petition when orderly channels to resolve the many questions caused by Cassidy's actions were available. Acceptance of the Petition would cause all of the difficult questions of standing and procedural impropriety, which are ignored in the Petition, to be glossed over. This would be unfair to the litigants and to the Court of Appeals.

Last, this Court should not exercise its *certiorari* jurisdiction to resolve questions which are so blatantly political as those involved here. See *Colegrove* v. *Green*, 328 U. S. 549, 556, 90 L. Ed. 1432, 1436 (1945). Petitioners are concerned with a reapportionment controversy. However, they are concerned not because of the principle of one man-one vote but, as demonstrated throughout the Petition, with the number of Republicans or Democrats that might be elected to Congress from the State of Illinois. (See Petition, pp. 9, 20, 21). Petitioners' speculation concerning possible makeup of the 1972 Illinois congressional delegation should not be a factor to be considered in determining review by *certiorari*.

All of the standards heretofore invoked by this Court in considering whether to exercise its jurisdiction on *certiorari* are ignored by petitioners. This Petition does not seek review of an order entered on the merits of the cause. It is from an order denying extraordinary and emergency relief. The denial of that relief and subsequent action in the District Court has rendered the instant controversy moot. Petitioners, of dubious standing, have had other avenues of relief open to them. If there is to be review by this Court of these matters, it should not be on this Petition which cannot raise substantive issues which might be of interest or importance.

CONCLUSION.

By virtue of the foregoing, these respondents respectfully pray that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

JEROME H. TORSHEN,
11 South LaSalle Street,
Chicago, Illinois 60603,
Attorney for Respondents, W. Robert Blair, Speaker of the Illinois House of Representatives, Henry J. Hyde, Majority Leader of the Illinois House of Representatives, and Edward Madigan, Chairman of the Committee on Reapportionment of the Illinois House of Representatives.